SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 653

THE UNITED STATES OF AMERICA, PETITIONER

vs.

O. B. FISH

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

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35849—25——1

In United States Court of Customs Appeals

O. B. FISH
vs.
THE UNITED STATES } No. 2266

Petition for review

To the Honorable the United States
Court of Customs Appeals:

Your petitioner, having complied with the statutes in such case made and provided, and being dissatisfied with the decision of the Board of United States General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, respectfully prays that the said Court of Customs Appeals review the questions of law and fact involved in said decision, and for that purpose prays that an order be entered requiring the said Board of Appraisers to return to said Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decision thereon. And your petitioner also prays for such other or further orders or relief in the premises as the statutes provide or to the Court shall seem just.

The particulars of the errors of law and fact involved in said decision of said Board of Appraisers of which your petitioner complains are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

Dated, New York, April 5, 1923.

O. B. FISH,
Petitioner,
By ALLAN R. BROWN,
Attorney, 1 Broadway, New York City.

2 Schedule A

The following are the importations and entries covered by this proceeding, with the approximate dates thereof, and with such other data as are convenient for purposes of identification:

Invoice No.	Entry No.	Vessel	Date of entry	No. of petition	Date of decision
1	774653	Parcel Post	11/ 9/22	305–R	3/20/23
	776484	Parcel Post	11/11/22	305–R	3/20/23
2	774653	Parcel Post	11/ 9/22	304–R	3/20/23

Assignment of errors

Schedule B

The Board of United States General Appraisers has denied the petitions filed under section 489 of the Tariff Act of 1922, covering the entries enumerated in Schedule A, thereby making errors of law and fact by failing to find, or finding the contrary of, the following propositions:

1. The entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise.

2. The fact that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise is manifest from the face of the papers without any testimony.

3. Said fact is established by the testimony.

4. The testimony of the custom house broker is not necessary to establish said fact.

5. The testimony of the custom house broker is not competent nor material to the establishment of said fact.

6. The custom house broker was not the only actor in the case.

7. The custom house broker was not an actor in the case.

8. The custom house broker was not the only man who could testify to the facts attending the entry specified in section 489.

3 9. The custom house broker could not testify to the facts attending the entry specified in section 489.

10. The custom house broker did not make the entry within the meaning of the statute.

11. The importer made the entry within the meaning of the statute.

12. The petitions should be granted.

Endorsed: United States Court of Customs Appeals. Filed Apr. 5, 1923. Arthur B. Shelton, Clerk.

Return of board to order of court

Board of United States General Appraisers

O. B. FISH, *Appellant*
vs. Suit No. 2266
UNITED STATES, *Appellee*

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General

Appraisers in the above case, and the said Court having ordered the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

A copy of

1. Petitions 304–R and 305–R and the letters of the collector of customs transmitting the same.
2. The testimony taken before the Board.
3. The Board's decision in question, Abstract 45757, and judgment order.

The entry papers will be forwarded later.

4 Witness the Honorable Jerry B. Sullivan, President of the Board, this third day of May, A. D. 1923.

[SEAL.]

D. P. DUTCHER,
Chief Clerk.

G. V. O.

Remission of Additional Duties.

Petition of 304–R

Before the Board of United States General Appraisers

In the Matter of Entry 774653, Parcel Post, Nov. 9, 1922, of O. B. FISH

Petition for Remission of Additional Duties under Section 489 of Title IV of the Tariff Act of 1922

Petition is hereby made under section 489 of title IV of the Tariff Act of 1922 for a finding of the Board of Appraisers and the remission or refund of the additional duties (so-called penal duties) on the following entry of O. B. Fish:

Entry No.	Vessel	Date of entry	Reappraisement No.
774653	Parcel Post	11/9/22	12120–A

The decision of the Board of Appraisers was on Jan. 23, 1923. The entry has not yet been liquidated. The entry of the merchandise at a less value than that returned upon final appraisement was

done without any intent to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. The importer entered the merchandise for duty upon the basis of the price paid by him and thought that this was the correct value.

The offer is hereby made to furnish further proof to the Board of United States General Appraisers, upon reasonable notice from them, of the facts involved, and in support of the contentions, herein.

A copy of this petition has been served upon the collector of customs and upon the Assistant Attorney General.

Respectfully submitted,

STRAUSS & HEDGES,
Attorneys for Importer.

5 *Affidavit*

304–R

STATE OF NEW YORK,
City and County of New York, ss:

O. B. Fish, being duly sworn, deposes and says: I am the importer in the above petition, doing business at 64 East 11th Street, New York City. I have read said petition and am familiar with the transaction and the facts stated in the petition are true to the best of my knowledge and belief.

O. B. FISH.

Sworn to before me this 25th day of January, 1923.

[SEAL] E. L. BLAUVELT,
Notary Public, Rockland County.

Board of U. S. General Appraisers. Received Jan. 29, 1923. D. P. Dutcher, Chief Clerk.

Copy received Jan. 29, 1923. Assistant Attorney General.

Report of the collector

304–R

Treasury Department

United States Customs Service

NEW YORK, N. J., Jan. 29, 1923.

Office of the Collector, District No. 10

To the Board of U. S. General Appraisers, New York.

GENTLEMEN:

A copy of an application for remission of additional duties accruing under section 489 of the Tariff Act of 1922 having been filed in

this office covering the importation named hereinafter; the papers are forwarded to your office herewith. (T. D.s. 39312 and 39336.)

Respectfully,

H. C. STUART,
Acting Collector.
J. J. M.

Importer	Entry No.	Date	Vessel
O. B. Fish	774653 Inv. #1	11/10/22	P. Post.

6 Entry for enclosed invoice to the Board on previous application with invoice #2. J. J. M.

Rec'd Jan. 29, 1923. B'd Gen'l Apprs.

Petition 305–R

Before the Board of United States General Appraisers

In the Matter of Entry 774653, Parcel Post, Nov. 9, 1922, etc., of O. B. FISH

Petition for Remission of Additional Duties under Section 489 of Title IV of the Tariff Act of 1922

Petition is hereby made under section 489 of title IV of the Tariff Act of 1922 for a finding of the Board of Appraisers and the remission or refund of the additional duties (so-called penal duties) on the following entries of O. B. Fish:

Entry No.	Vessel	Date of entry	Reappraisement No.
774653	Parcel Post	11/ 9/22	11885–A
776484	Parcel Post	11/11/22	11884–A

The decision of the Board of Appraisers was on Jan. 11, 1923. The entries have not yet been liquidated. The entry of the merchandise at a less value than that returned upon final appraisement was done without any intent to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. The importer entered the merchandise for duty upon the basis of the price paid by him, and thought that this was the correct value.

The offer is hereby made to furnish further proof to the Board of United States General Appraisers, upon reasonable notice from them, of the facts involved, and in support of the contentions, herein.

A copy of this petition has been served upon the collector of customs and upon the Assistant Attorney General.

Respectfully submitted,

STRAUSS & HEDGES,
Attorneys for Importer.

7 *Affidavit*

305–R

STATE OF NEW YORK,
City and County of New York, ss:

O. B. Fish, being duly sworn, deposes and says: I am the importer in the above petition doing business at 64 East 11th Street New York City. I have read said petition and am familiar with the transactions and the facts stated in the petition are true to the best of my knowledge and belief.

O. B. FISH.

Sworn to before me this 25th day of January, 1923.

[SEAL] E. L. BLAUVELT,
Notary Public, Rockland County.

Board of U. S. General Appraisers. Received Jan. 29, 1923. D. P. Dutcher, Chief Clerk.

Copy received Jan. 29, 1923. Assistant Attorney General.

Report of the collector

305–R

Treasury Department

United States Customs Service

NEW YORK, N. Y., Jan. 29, 1923.

Office of the Collector, District No. 10

To the Board of U. S. General Appraisers, New York, N. Y.

GENTLEMEN:

A copy of an application for remission of additional duties accruing under section 489 of the Tariff Act of 1922 having been filed in this office covering the importations named hereinafter, the papers are forwarded to your office herewith. (T. Ds. 39312 and 39336.)

Respectfully,

H. C. STUART,
Acting Collector.
J. J. M.

8 Importer	Entry No.	Date	Vessel
O. B. Fish------	774653 Inv. #2 (One application.)	11/10/22	P. Post.
" ------	776484	11/13/22	"

Rec'd Jan. 29, 1923. B'd Gen'l Apprs.

Proceedings before the board

The U. S. General Appraisers

In the Matter of the Application of O. B. FISH for the Remission of Additional Duties

Nos. 304–R and 305–R

NEW YORK, February 15, 1923.

Present:
General Appraiser WAITE, Chairman.
General Appraiser ADAMSON.

Appearances:
Strauss & Hedges (by John F. Strauss), Counsel for the Petitioner.
Pelham St. G. Bissell, Special Attorney, for the United States.

Mr. Strauss: These two cases cover three invoices, two of which are covered by the same shipment and one of which covers another shipment. The merchandise is called peacock flues.

OSCAR B. FISH, having been duly sworn in his own behalf, testified as follows:

By Mr. Strauss:

Q. Mr. Fish, you are the importer of the merchandise covered by the three invoices embraced in these two petitions for remission of additional duties? A. Yes, sir.

Q. You are personally familiar with the merchandise? A. Yes. sir.

Q. And the facts relating to the various cases? A. Yes, sir.

9 Q. What was the merchandise which is described apparently as peacock flues? A. Peacock flues are the small feathers on the side of the stem of the peacock. These flues were stripped down in China.

Q. It was the portion of the peacock feather which has been stripped off the quill? A. Yes, sir.

Q. In what condition are they as imported, just stripe as stripped from the quill? A. They are put through a process there, a machine process or needle process.

Q. So that they were in what shape as imported? A. Well, what we call plaited.

Q. What is the principal market for these goods in China? A. Hongkong.

Q. How did you buy these goods? A. By cable.

Q. Do you keep track of the market in these goods from time to time by quotations? A. We are not concerned with the market over there except in the instances when we are trying to buy.

Q. But when you do buy you get quotations? A. Yes, sir.

Q. By cable? A. Yes, sir.

Q. And accept them by cable? A. We may make counter offers which might be accepted.

Q. These goods are invoiced in these two cases at prices of 26, 28 and 32 dollars Hongkong per pound and were entered at such prices and appraised in every instance at $32. Is this an ordinary, common article of merchandise? A. It is a new method of preparing these goods for this market for the past two years.

Q. Is there a big demand? A. At times.

Q. Is it a steady market or fluctuating market? A. A fluctuating market.

Q. Widely fluctuating—to what extent fluctuating? A. To an extent of 30 to 35 per cent in my experience.

Q. From day to day or hour to hour? A. Oh, no, not to that extent. To my experience in the past two years—well, I should say from 50 per cent; 50 per cent fluctuating.

Q. In what period of time would that take place? A. The value of these goods two years ago——

Q. We do not care about that. What we are getting at, Mr. Fish, is this: Is the market a steady one so that a quotation or purchase today would be at the same figures as those a week ago? A. Oh, no.

Q. Would a purchase today be at the same figures as yesterday or two days ago? A. Not necessarily.

Mr. Bissell: I must object to these hypothetical questions. Let us have the facts before the court in regard to what the fluctuations were.

Mr. Strauss: We are not challenging the appraised value, we submitted to the Government figures below.

Judge Waite: No, there is no question of the appraised value.
10 He has practically conceded that value. Now he is furnishing an excuse for not entering at that.

Q. You have been importing these goods for the last two years? A. I have.

Q. Are these the first shipments that have been advanced in value? A. The only shipments.

Q. The prices of 26, 28 and 32 shown on your consular invoice represent the price actually paid for the merchandise? A. Exactly.
Q. The price you contracted to pay for them? A. We paid in American dollars, they were shipped in Hongkong currency.

Judge Waite: They are invoiced in Hongkong currency.

Q. You bought c. i. f. New York? A. Yes, sir.
Q. Now will you please explain, if you know, the variation in the prices of the same goods on the same invoice? A. Purchased under different contract dates.
Q. Can you give us the dates? A. If I can refer to the bill.
Q. Any paper that you have.

Mr. Bissell: For the sake of the record we will concede that those purchased July 7, 1922, were at $26, those purchased on August 20, 1922, were at $28, and those purchased August 30, 1922, were purchased at $32.

Gen. Appr. Adamson: What I want to know in order to judge the case properly is what facts he acted on to make him believe he was entering at the proper value. That is what I want to know, what diligence he exercised to learn the facts.

Q. When these goods arrived what did you do in relation to entering the merchandise? A. Sent the papers to the customs brokers.
Q. With any instructions? A. No, sir.
Q. They entered according to the consular invoices? A. Surely.
Q. In doing that was there any intention on your part to mislead the appraiser? A. Certainly not.

Mr. Bissell: I object to the question of intent being asked. It should be shown by the acts of the individual, not by testimony as to the intent.

Judge Waite: I am not clear that the man cannot state what his intent was. His intent really is just his proceeding. I am inclined to think you can take his answer as to what his intentions were. It is not binding, of course.

Mr. Bissell: Intent in practically all cases I know of before any court always has to be shown by the acts of the individual, not by direct testimony as to what the individual intended to do.

Judge Waite: If you can show me some authority on that I would be glad to see it. I don't understand the law that way.
11 Still, I don't know that it is material here in this case where there is no jury.

Q. Did you do anything affirmitively or negatively intending to mislead him? A. Certainly not.
Q. As a matter of fact your invoices showed you the priec and the same invoices showed varying prices, did they not? A. Certainly.

Q. From your experience, Mr. Fish, please state whether or not the market value as of any particular time on this merchandise can be learned with any degree of accuracy.

Mr. Bissell: Objected to. The Board has found a market value.

Gen. Appr. Adamson: The question is what did he know about it?

A. I did not concern myself about the market value at the time. I take these invoices as they come in at the price I purchased at.

Gen. Appr. Adamson: Do you know anything about the market whatever outside of the invoice?

Witness: No, sir.

Gen. Appr. Adamson: Did you try to find out?

Witness: No, sir.

Gen. Appr. Adamson: Did you know any fact that led you to believe that the market was any higher than you paid?

Witness: No, sir.

Q. Further than that, in making the entry at the price you did, was there any intention on your part to defraud the revenue of the United States? A. Certainly not.

Q. Did you conceal or misrepresent any fact within your knowledge? A. I gave the broker the invoice and told him to make the entry.

Q. Did you intend to deceive the appraiser? A. Assuredly not.

Mr. Strauss: One of the entries gives three different prices, one of which was adopted by the appraiser, which would indicate no intent to deceive the appraiser because the highest price taken is shown on the invoice.

By Judge Waite:

Q. Peacock flues is a common commodity, I understand? A. It is becoming a common commodity.

Q. Has been for how long? A. The past two years.

Gen. Appr. Adamson: Was that highest price the last one?

Mr. Strauss: The last invoice, October 2d, was $28. The earliest shipment, September 26, was $36.

12 *Gen. Appr. Adamson:* What was the date of entry at $32, the first or last?

Mr. Strauss: The entry was by parcel post and the entries were approximately the same date, November 9 or 11.

Gen. Appr. Adamson: All made about the same date?

Mr. Strauss: Yes, sir.

Judge Waite: This invoice dated Hongkong, September 26, has got all prices on it.

Mr. Strauss: You will find another invoice——

Judge Waite: These three shipments we are speaking of here, invoiced at $26, $28, $32, all on one invoice.

Mr. Strauss: Then there is another part of it also, being an extract. Now comes this, the date of consulation of which was the second day of October later, at $28. He had an invoice at a later date at a lower price. We rest on the proposition that when we disclosed those prices, one of which is adopted, the appraiser adopts the highest of the three prices, there can be no intention of fraud because we have put before him the very highest of the prices.

Gen. Appr. Adamson: It appears here the broker made the entry not the importer.

Mr. Strauss: The broker did not make the entry in his own name. All the broker did was to prepare the papers.

By Mr. Bissell:

Q. How long have you been importing? A. About 1895.

Q. During that entire period you have been acquainted with the practice and know that the entry must be made at the home market value at the date of exportation, or as in the present instance, at the export value if it is higher? A. I have always entered my goods in the past on the invoice cost.

Q. Will you answer the question? (Question read.) A. Yes, sir.

Q. Did you make any effort to ascertain what the value was on the date of exportation of these goods? A. I did not, and if we did that we would have to cable in every instance on every entry we make.

Case submitted.

13 *Decision of the Board*

Board of United States General Appraisers

Before Board 3

March 20, 1923.

In the Matter of Petitions Nos. 304–R and 305–R of O. B. Fish for Remission of Additional Duties Imposed by the Collector of Customs at the Port of New York.

Adamson, *General Appraiser:*

In these two petitions, which were heard together, the importer seeks relief from certain additional duties. His testimony in brief was to the effect that he bought the merchandise, that he did not concern himself about the market price, that he paid the invoice price, that he sent the invoice to the broker without instructions and that the broker entered at the invoice price.

The importer was permitted to testify, over objection by counsel, that he had no intention to deceive the appraiser or defraud the Government of revenues. The writer of this opinion thinks that was error, for we determine intention from conduct described by testimony, but probably harmless error in this case because the importer did not himself make the entry and could not swear to any conduct of the broker, his agent, who made the entry, and the broker was not sworn as a witness to purge himself. Whatever conduct he committed was imputed to his principal. By purging himself of bad faith, he could have purged his principal. But as the only actor in the case and the only man who could testify to facts attending the entry was silent, there is absolutely no evidence from which we can conclude what was the intent of the person making the entry. The most that can be said about the importer was that he was very careless. Sometimes neglect is as bad in law as acts of commission.

The petitions are denied.

BYRON S. WAITE,
EUGENE G. HAY,
W. C. ADAMSON,
Board of U. S. General Appraisers.

14 *Judgment order*

At a Term of Board 3 of United States General Appraisers Held in the City of New York on the 20th Day of March, 1923

Present:
General Appraisers WAITE, HAY, ADAMSON.

Petitions Nos. 304–R, etc.

In the Matter of the Petitions of O. B. FISH for the Remission of Additional Duties

The above-entitled cause having regularly come on to be heard, and the Board, in its decision dated the 20th day of March, 1923, having determined the law and facts in favor of the Government;

It is hereby ordered, adjudged, and decreed this 20th day of March, 1923, that the petitions in this case be and the same are hereby denied.

BYRON S. WAITE,
Chairman Board 3.

[SEAL] By D. P. DUTCHER,
Chief Clerk.

Endorsed: United States Court of Customs Appeals. Filed May 4, 1923. Arthur B. Shelton, Clerk.

(9440)

15 In United States Court of Customs Appeals

Notice of motion to dismiss

SIRS: Please take notice that upon the annexed affidavit of Samuel M. Richardson, verified the 28th day of July, 1923, and upon the record herein, the undersigned will move this Court at a Term thereof to be held at the Court House, Washington, D. C. on the 2nd day of October, 1923, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order dismissing the appeal herein upon the ground that this Court has no jurisdiction to entertain the said appeal.

Dated, July 28th, 1923.

Yours, etc.,

(Signed) WM. W. HOPPIN,
Assistant Attorney General, Attorney for Appellee.

To

ARTHUR B. SHELTON, ESQ.
Clerk, United States Court of Customs Appeals.

ALLAN R. BROWN, ESQ.
Attorney for Appellants, 11 Broadway, New York City, N. Y.

Affidavit of Samuel M. Richardson, filed July 30, 1923

STATE OF NEW YORK,
City and County of New York, ss:

Samuel M. Richardson, being duly sworn, says that he is the Managing Attorney attached to the staff of William W. Hoppin, Assistant Attorney General in charge of customs matters.

That the appellant herein filed petitions under Section 489 of the Tariff Act of 1922 with the Board of United States General Appraisers for the remission of additional duties.

That the said Board rendered a decision denying the applications upon the law and the facts.

That this appeal was taken to review the decision of the Board of General Appraisers.

16 That deponent has made diligent search and has been unable to find any provision of law authorizing said appeal, and verily believes that this Court has no jurisdiction to entertain the same.

Wherefore deponent prays for an order dismissing the appeal herein.

(Signed) SAMUEL M. RICHARDSON.

Sworn to before me 28th day of July, 1923.

M. L. WALKER,
Notary Public.

[File endorsement omitted.]

In United States Court of Customs Appeals

Argument of Cause

March 18, 1924

Motion of appellee to dismiss said appeal, and said appeal on its merits, came on to be heard before the court and arguments of counsel thereon were commenced.

* * * * * * *

(Signed) GEO. E. MARTIN,
Presiding Judge.

In United States Court of Customs Appeals

Submission of notice to dismiss

March 19, 1924

17 [Title omitted.]

Motion of appellee to dismiss, and said appeal on its merits, came on to be heard before the court and arguments of counsel thereon were concluded and said motion to dismiss and said appeal were taken under advisement by the court.

* * * * * * *

(Signed) GEO. E. MARTIN,
Presiding Judge.

In United States Court of Customs Appeals

Certificate of importance

Filed March 25, 1924

[Title omitted.]

To the Honorable The Judges of said Court:

In accordance with the provisions of the Act of Congress establishing the Court of Customs Appeals, I hereby certify that in my opinion the case above-stated is of such importance as to render expedient its review by the Supreme Court of the United States in the manner provided by said Act.

This 15th day of March, 1924.

(Signed) JAMES M. BECK,
Acting Attorney General.

[File endorsement omitted.]

18 United States Court of Customs Appeals

[Title omitted.]

Opinion June 28, 1924

BLAND, *Judge.*

This is an appeal from a decision of the Board of General Appraisers denying two petitions filed under section 489 of the tariff act of 1922 with relation to additional duties.

The petitions prayed for orders or findings of the board that the importer entered the merchandise at a less value than the final appraised value thereof without intent to defraud the revenues of the United States, or to conceal or misrepresent the facts, or to deceive the appraisers as to the value of the merchandise.

Section 489 of the tariff act of 1922 reads as follows:

"Sec. 489. Additional duties. * * * Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of manifest clerical error, upon the order of the Secretary of the Treasury, or in any case upon the findings of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. * * *

19 "Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. * * *"

The importer purchased at Hong Kong the following quantities of plaited peacock flues at the following prices and on the following dates:

50 pounds at $26.00 per pound, July 9, 1922.
48 pounds at $28.00 per pound, July 27, 1922.
50 pounds at $28.00 per pound, Aug. 20, 1922.
36 pounds at $28.00 per pound, Aug. 30, 1922.
27 pounds at $32.00 per pound, Aug. 30, 1922.

The importations were entered at the customhouse by the importer's broker, and the entered value stated in the entries was the price paid for each lot of flues, which was also the invoice price. All of the goods were appraised at $32.00 per pound. Whereupon the importer filed petitions under section 489.

In support of the petitions, importers at the trial brought forward the importer Strauss who testified that peacock flues are small feathers on the sides of the stems of peacock feathers; that they are put through a machine or needle process in China; that he purchased the goods by cable; that he was not concerned with the market in

China except in the instances when he was trying to buy; that when he bought, he got quotations by cable, and that he made counter-offers; that the method of preparing these goods for the market has prevailed for the last two years, and that at times there is a big demand for them; that the market fluctuates, and during the last two years has fluctuated as much as fifty per cent; that the price on yesterday or two days ago would not necessarily be the price of the goods today; that he has been importing the goods for two
20 years, and that this was the first instance in which there had been an advance in value by the appraiser. He was not asked if he had made any entries other than the ones in question under the act of 1922. He stated he made the purchases on the dates and for the prices set out above, and when the goods arrived, he sent the papers to his customs brokers with no instructions, and that they entered the goods according to the consular invoices; that in doing so there was no intention on his part to mislead the appraiser; that he did nothing affirmatively or negatively intended to mislead the appraiser; that he did not concern himself about the market value at the time; that in making the entry at the price he did, there was no intention on his part to defraud the revenues of the United States, and that he gave the broker the invoice and told him to make the entry, and that in so doing he did not intend to deceive the appraiser; that during the past two years peacock flues have been a common commodity; that the shipment was by parcel post, and the entries were approximately of the same date, November 9 and 11; that the invoice dated at Hong Kong, September 26, has all the prices on it; that the broker did not make the entry in his own name, but did prepare the papers; that he had been importing since 1895; that he made no effort to ascertain what the value was on the date of exportation of the goods; that if he had made such effort, he would have been required to have cabled in every instance on every entry he made. This was all the evidence there was.

The Board of General Appraisers denied the petition apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent.

The Government in this court moved to dismiss the appeal on the ground that there was no statute giving the right to appeal.

Sections 195 and 198 of the Judicial Code, adopted March 3, 1911, read as follows:

"Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to re-
21 view by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable ques-

tions as to the laws and regulations governing the collection of the customs revenues; * * *

"Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *"

In *Brown & Co. et al* v. *United States* (12 Ct. Cust. Appls. ; T. D. 40026), an appeal was taken from the decision of the board dismissing the petition for an order under section 489, which decision held that the board was without jurisdiction to consider the petition. On appeal to this court, we held that the action of the board in dismissing the petition for re-hearing was a final decision "as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith," and was an appealable question "as to the jurisdiction of said board," and also raised an appealable question as "to the laws and regulations governing the collection of customs revenues."

It may be contended that the Brown case, supra, deciding a question of the jurisdiction of the board, is not in point with the case at hand. We think otherwise. The action of the Board of General Appraisers upon the petition for an order for the remission of duties is, under the same sections of the Code, a final decision "as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith," and such action on the part of the board also, as in the Brown case, raises an appealable question as to the laws and regulations governing the collection of customs revenues.

22 Under section 195, the Court of Customs Appeals is given exclusive appelate jurisdiction to review "final decisions by the Board of General Appraisers in all cases as to the construction of law and facts" * * * in "all appealable questions as to the laws and regulations governing the collection of customs revenues."

Section 198 provides that the importer may apply to the Court of Customs Appeals for a review of the construction of law and facts involved in a decision of the Board of General Appraisers or "any other appealable decision of the board."

It will be noted that in section 195 the words "final decisions" are used, and in section 198 the word "decision" is used. Under either section above referred to, this court is authorized to review the action of the board involved in this case. The action of the board denying the petition is a final decision; it is the end of the issue involved in the hearing in that case as far as the Board of

General Appraisers is concerned. The act of 1922 gives the board a new duty to perform, and in such duty they have exclusive original jurisdiction. Their action is not temporary or subject to change or modification by them; it is final and conclusive as between the parties. If the board in this case had decided that there was no intent to defraud the revenues etc., and had made an order or finding accordingly, could it have been contended that the order or finding was not final and was not a decision standing out independent of any other issue that might arise from the entry? It may be contended that the action of the board on petitions for remission like the one at hand is in the nature of an interlocutory order. Interlocutory means "Not final provisional, temporary." (Corpus Juris, 36, p. 268.)

"Interlocutory orders are not orders which finally settle the main issue in the case and dispose of the litigation. The final decision oft-times is in no way related to the interlocutory decision. An interlocutory decision is an incident of the case and only settles some intervening matter related to the main case." (Corpus Juris, Ibid, and cases cited.)

What issue could the board have in hand in this case to which their action on the petition would be interlocutory? If there had been no appeal, the collector would have liquidated the entry, and as far as the Board of General Appraisers was concerned,
23 the whole matter would have been ended. The motion of the Government to dismiss the appeal of appellant is overruled.

Appellant assigns as error of law and fact the failure of the board to find that the entry of the merchandise by the importer at a less value than that returned upon final appraisement was without any intention to defraud the revenues of the United States or conceal or misrepresent the facts of the case or deceive the appraiser as to the valuation of the merchandise. We think this assignment of error squarely presents the question as to whether upon appeal this court is authorized to review the evidence in the hearing before the board. For the reasons heretofore assigned in connection with the Government's motion to dismiss the appeal, and in conformity with the sections of the statute heretofore quoted, we think it is our duty to review the evidence introduced before the board.

It is contended that such review must be only as to such matters of evidence as would amount to questions of law. In other words, it is contended that if there is any evidence to support the finding of the board that this court cannot disturb its finding, and that if there was no evidence to sustain its finding, we would be justified (assuming we have the right to review) in disturbing the finding of the board purely as a matter of law.

In the early history of the court, in a very well considered case, Presiding Judge Montgomery rendering the decision of the court clearly stated the rule applicable to this issue. In *United States* v.

Riobe (1 Ct. Cust. Appls. 19; T. D. 30776), on a question of classification and the question as to whether this court has the power to review questions of fact, the court decided that it did have the right to review the facts, and furthermore, applied the rule in the trial of equity cases rather than the law rule. They were there construing section 198, which is now before us, and used the following language:

"A careful reading of this statute satisfies us that it was the intent of Congress that this court should have the power to review questions of fact. The circumstances that all the evidence before the board is competent evidence and that all is required to be returned to this court indicates that such was the intent.

23½ "We think the proper practice is analogous to that which obtains on appeals in equity cases in the State or Federal courts. That rule has been stated in various ways in the different courts, but the courts all recognize the better opportunities of a trial court to judge of the credibility of witnesses, and hesitate for this reason to disturb the conclusion except in a case where the evidence is clearly inconsistent with the conclusion reached by the trial court. The rule as stated in the *Blankensteyn case* (56 Fed. 474) is as follows:

"'The circuit court should not undertake to disturb the findings of the board upon doubtful questions of fact, and especially as to questions of fact which turn upon the intelligence and credibility of witnesses who have been produced before the board. But when the finding of fact is wholly without evidence to support it, or when it is clearly contrary to the weight of evidence, it is the duty of the circuit court to disregard it.'

"We think this a fair and correct statement of the rule which should govern us under the organic statute above quoted.

"This leads us to the inquiry as to whether the conclusion of the board in this case is clearly against the weight of evidence. We have not been able to satisfy ourselves that the Government has presented such a case." (p. 20.)

The rule of law that if there is any evidence to support the finding of the trial tribunal that it cannot be disturbed on review is not applicable to the review by this court of proceedings before the board on petitions filed under paragraph 489 of the act of 1922, but the rule in the trial of equity cases, as laid down by this court in the Reibe case, supra, must be applied.

A casual reading of section 489 might lead to the hasty conclusion that the words "upon petition filed and supported by satisfactory evidence under such rules as the board may prescribe" left action upon the petition to the arbitrary discretion of the board, and that "satisfactory evidence" might mean *satisfactory to the board*. This was not the intention of Congress, and the courts have not so construed similar provisions.

In *United States* v. *Lee Huen* (118 Fed. 442) the court was construing the following provision from the statutes:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States,"

and the court there said:

"In this connection it should be remembered that credible and undisputed evidence amounts to proof, and must be accepted
24 as such. What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached, and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied."

The court quoted Stephens' Digest and Greenleaf on Evidence, as defining "satisfactory evidence," as follows:

"Satisfactory or sufficient evidence: That amount or weight of evidence which is adapted to convince a reasonable mind." (Steph. Dig. Ev. 2d Ed. p. 3, note 2.)

"By 'satisfactory evidence,' which is sometimes called 'sufficient evidence,' is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest." (1 Greenleaf, Evidence, Sec. 2.)

Observing the above meaning of the word "satisfactory," the board had the right to determine whether the evidence introduced by the importer was "satisfactory," and this court on appeal guided by the principles heretofore set out must pass upon the question as to whether the finding of the board that the evidence was *not satisfactory* was correct.

In passing upon this question we think it is proper to have in mind that in tariff laws preceding the act of 1922, there was no provision for remission of additional duties except for manifest clerical error. By imposing additional duties for undervaluation, Congress sought to prevent an undervaluation which might lead to defrauding the customs revenues or to concealing or misrepresenting the facts

of the case, or to deceiving the appraiser as to the valuation of the merchandise. The act of 1922 recognizing that there were instances of undervaluation which were free from taint of fraud or ulterior motive, liberalized the law under which importers could obtain remission of additional duties. It however put upon the im-
25 porter the burden of showing by satisfactory evidence affirmatively that in entering his merchandise at a price lower than the appraised value that he did not intend the things the Government had sought to prevent in the enactment of the additional duties provisions.

While there may be no legal presumption of fraud or intent to deceive etc., in the fact that additional duties have been levied or that an undervaluation had been made, Congress, recognizing the possibility and even the probability of the existence of such conditions, placed the burden upon the importer to show affirmatively that such did not exist. The witnesses with whom the importer must make this showing are before the board and on questions of intent to defraud and deceive, the appearance of the witness, his conduct and manner of giving evidence must necessarily be given great weight by the board in determining the honesty and sincerity of the importer. It might have been well for Congress to have left the matter entirely to the discretion of the board, or to have prescribed that in reviewing facts the rule of law and not the rule in the trial of equity cases should be applied in appeals to this court. This court can not supply legislation, and under the rule in the trial of equity cases, we must review the evidence with the view of determining as to whether it was "satisfactory." For the reasons heretofore set out, this court will be slow to disturb the finding of the board on the weight of the evidence on petitions under this section of the statute. Their better opportunity for weighing the evidence properly before them in this particular jurisdiction where fraud, concealment and decit are involved, is recognized by this court, and when reviewing the facts upon which their decision is based, will be given great weight. (*Creamer* v. *Bivert* 214 No. 473; 113 J. W. 1118.)

In the present case however, as above observed, we find that the Board of General Appraisers denied the petition of the importer apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent. The opinion below closes with the following
statement: "The most that can be said about the importer
26 was that he was very careless. Sometimes neglect is as bad in law as acts of commission."

We need not here discuss the question raised by the fact that the importer failed to call as a witness the broker who made the entry, for we are satisfied that the judgment of the board must be reversed upon the ground that apparently the importer was denied a remission of the additional duties chiefly if not entirely upon the ground that he was very careless in the transaction relating to the making

of the entry. As we have stated above the burden rested upon the importer to establish by satisfactory evidence that his action was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. If the importer in any such case establishes these facts as aforesaid he becomes entitled thereby to the findings of the board in his favor as prescribed by the statute, and he would not forfeit that right because of mere carelessness alone upon his part in the transaction.

In the present case, if we construe the board's opinion correctly, the importer's petition was denied upon the ground that if the importer was not guilty of fraud he was at least very careless. We do not regard this finding as an answer to the issue raised by the importer's petition, or as a sufficient ground for its denial, accordingly we reverse the board's judgment and remand the case for a new trial.

Reversed.

27 In United States Court of Customs Appeals

[Title omitted.]

Dissenting opinion

SMITH, *Judge*, dissenting from the denial of the motion to dismiss and concurring in the conclusion reached on the merits.

I am sorry but I must dissent from that part of Judge Bland's decision which denies the Government's motion to dismiss the importer's appeal.

Sections 195 and 198 of the Judicial Code give to this Court the right to review only such *final* decisions of the law and the facts respecting *the classification* of imported merchandise and *the rate of duty* imposed thereon and the fees and charges connected therewith and all appealable questions as to the *jurisdiction* of said Board and all appealable questions as to the laws and regulations governing the enforcement and collection of customs revenues.

In this case no question is raised as to the classification of the merchandise or as to the rate of duty imposed thereon or to the fees or charges exacted by the collector or as to the jurisdiction of the Board to hear and determine the importer's petition. Neither is there any *final* decision or judgment as to the laws and regulations governing the collection of the customs revenues. Indeed, no such decision was possible until after liquidation of the entry and as yet no such liquidation has been made.

The finding provided for in section 489 is purely preliminary and interlocutory and is not a final decision or judgment inasmuch
28 as it does not finally determine or purport to finally determine the rights of the parts.

In the case of *Brown & Co.* v. *United States* (12 Ct. Cust. Appls., ——; T. D. 40026, the Board of General Appraisers held that it was without jurisdiction to entertain the petition provided for in paragraph 489 and ordered its dismissal. From that order

an appeal was taken to this Court and that appeal we refused to dismiss on the ground that the decision of the Board raised an appealable question as to the *jurisdiction* of said Board and an appealable question as to the laws and regulations governing the collection of customs revenues. In this case no appealable question as to the jurisdiction of the Board or as to the laws and regulations has been raised or can be raised until the Board is called upon to finally decide the rights of the parties.

In my opinion Congress vested the Board of General Appraisers with exclusive and final authority to hear the petition and make the finding provided for by section 489. As I see it, its finding is just as binding and conclusive on us as was that of the Secretary of the Treasury as to remission of additional duties under the law as it existed prior to the passage of section 489. But if the Board of General Appraisers be not the final arbiter in the matter, its finding is not a final decision or judgment and any error committed by the Board must be reached by way of protest against the final liquidation. To hold otherwise simply means the postponement of liquidation for a period of eight months or a year and useless delays in the transaction of customs business. I cannot think that Congress intended any such result as that and that if it had, it would have expressly given the right of appeal, just as it did in appraisement cases.

I concur in the conclusion reached on the merits of the case.

29 In United States Court of Customs Appeals

Judgment June 28, 1924

[Title omitted.]

Said appeal, together with motion of appellee to dismiss the same, having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered that motion of appellee to dismiss said appeal be, and the same is hereby, denied.

It is—

Further ordered that the judgment of the Board of United States General Appraisers be, and the same is hereby, reversed, and said appeal is remanded to said Board for a new trial in conformity with the opinion of the court herein.

* * * * * * *

(Signed) JAMES F. SMITH,
Acting Presiding Judge.

In United States Court of Customs Appeals

[Title omitted.]

Certificate re mandate of Court of Customs Appeals

The final mandate in the above entitled appeal, consisting of a certified copy of the order of the Court of the 28th day of June, 1924,

was issued to the Board of United States General Appraisers on the 29th day of July, 1924.

ARTHUR B. SHELTON,
Clerk.

30 In United States Court of Customs Appeals

[Title omitted.]

Clerk's certificate

I, Arthur B. Shelton, Clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages, numbered 1 to 29, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the above entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court, this 29th day of August, A. D. 1924.

[SEAL] ARTHUR B. SHELTON,
Clerk.

31 Supreme Court of the United States

Order granting petition for certiorari filed Oct. 27, 1924

On petition for writ of certiorari to the United States Court of Customs Appeals.

On consideration of the petition for a writ of certiorari herein to the United States Court of Customs Appeals, and of the argument of counsel thereupon had, it is now here ordered by this Court that the said petition be, and the same is hereby, granted, the record already on file as an exhibit to the petition to stand as a return to the writ.

○

In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PETITIONER
v.
O. B. FISH
} No. ——

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS, AND BRIEF IN SUPPORT THEREOF

The United States prays for a writ of certiorari directed to the United States Court of Customs Appeals to bring before this Court for review the decision and judgment rendered by the United States Court of Customs Appeals on the 28th day of June, 1924, in the case entitled "*O. B. Fish, Appellant,* v. *The United States, Appellee,* No. 2266."

This petition is filed pursuant to section 195 of the Judicial Code, as amended.

On the 25th day of March, 1924, prior to the decision of the Court of Customs Appeals, the Attorney General of the United States duly filed in the office of the Clerk of the Court of Customs Appeals a certificate under Section 195 that, in his opinion, this case is of such importance as will render expedient its review by the Supreme Court of the United States.

8437—21—1

THE FACTS

The respondent herein filed two petitions for the remission of additional duties imposed by the Collector of Customs at the port of New York. The petitions were tried together by the Board of General Appraisers and denied by said Board. The respondent thereafter, on or about April 5, 1923, appealed to the Court of Customs Appeals from the decision of the Board of General Appraisers, basing its right to such appeal on the language of sections 195 and 198 of the Judicial Code, as amended.

Thereafter and on or about the 28th day of July, 1923, the United States, appellee, duly moved that the said appeal be dismissed by the Court of Customs Appeals upon the ground that that court had no jurisdiction to entertain the same. The motion to dismiss the appeal, as well as the issues raised by the appeal itself, were duly argued before the Court of Customs Appeals, which court on the 28th day of June, 1924, rendered its decision denying the motion of the United States to dismiss the appeal (Smith J. dissenting), and also rendered its decision upon the issues involved in the appeal by reversing the judgment of the Board and remanding the case to the Board of General Appraisers for a new trial.

THE ISSUE

Has the Court of Customs Appeals jurisdiction to entertain appeals from decisions granting or denying petitions for the remission of additional duties filed under section 489 of the tariff act of 1922 (42 Stat. 858, c. 356)?

IMPORTANCE OF ISSUE

Nineteen hundred petitions for remission of additional duties under section 489, *supra*, have been filed with the Board of General Appraisers. Over twelve hundred are now pending undetermined. The importance of an early determination of this question to prevent congestion of the dockets and a possible waste of time seems to us to justify this application for a writ of certiorari.

JAMES M. BECK,
Solicitor General.
WM. W. HOPPIN,
Assistant Attorney General.

SEPTEMBER, 1924.

BRIEF IN SUPPORT OF PETITION

The decision of the Board of General Appraisers on a petition for remission of additional duties does not raise an "appealable question."

The Court of Customs Appeals bases its decision denying the motion of the Government to dismiss on sections 195 and 198 of the Judicial Code which, so far as material, read:

> (195) The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such

> classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. * * *
>
> (198) If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *

The United States submits that that court had no jurisdiction to entertain such an appeal. Being an inferior United States Court it has only such jurisdiction as has been specifically granted to it by statute, and nothing in the two sections above set forth in which the jurisdiction of the Court of Customs Appeals is delimited grants jurisdiction in such a case.

The tariff act of 1922 for the first time has granted importers a method of relief from the imposition of

additional duties in section 489. That section, so far as material, reads as follows:

> (489) * * * Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of a manifest clerical error, upon the order of the Secretary of the Treasury, *or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise.* * * * Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. (Italics ours.)

The Court of Customs Appeals in its decision holds that the decision of the Board of General Appraisers on such a petition is a final decision, and under the language of section 195, *supra*, the appellate jurisdiction of that court as to "final decisions, by the Board of General Appraisers in all cases as to the construction of law and facts" and "all appealable questions as to the law and regulations governing the collection of customs duties" is sufficient to give that court jurisdiction.

Nothing in section 489 of the tariff act of 1922 specifically grants jurisdiction to the Court of Customs Appeals. This becomes important when it is noted that in other cases in which the tariff act of 1922 has prescribed rights to the importers additional to those theretofore given to them under prior acts, it has in each case specifically provided for an appeal to the Court of Customs Appeals.

Thus in section 316 of the act of 1922, providing for certain powers of the President and of the United States Tariff Commission, an appeal is authorized from the findings of such Commission upon questions of law to the United States Court of Customs Appeals.

In section 501, providing for the method of reappraisement of merchandise, it is stated that the decision of the Board of General Appraisers thereunder shall be final and conclusive upon all parties unless appeals shall be taken to the Court of Customs Appeals in accordance with section 198 of the Judicial Code, above quoted.

In section 515, the right of appeal to the Court of Customs Appeals is given from decisions of the collector, as set forth in section 514 of the act, which latter section has broadened the right of protest in many cases, including decisions of the collector as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury); his decisions excluding merchandise under any provision of the customs law; his refusal to pay any claim for drawback, as to none of which is there a right to protest under prior acts.

In section 516 (c) the right of either party to appeal to the Court of Customs Appeals is given in cases where an American producer has filed a protest, which is a new right never before given in tariff acts.

In section 517 a right of appeal to the Court of Customs Appeals is given where a penalty has been imposed upon a protestant for filing a frivolous protest.

Under section 563 a right of appeal is given to either party to the Court of Customs Appeals on claims for allowance for injury or destruction of merchandise while in bonded warehouse or other customs custody.

Thus it is noted that in cases where Congress intended the Court of Customs Appeals to have jurisdiction over new rights granted to importers in the tariff act of 1922, specific jurisdiction over appeals involving such rights has been distinctly granted.

Necessarily the Judicial Code, sections 195 and 198, *supra*, could have had no application as to petitions for remission of additional duties because at the time of the passage of the Judicial Code there was no such right reserved to an importer.

It seems clear, therefore, that there is no direct grant of authority to the Court of Customs Appeals to review such decision. The court bases its determination upon the fact that the decision of the Board of General Appraisers is a final decision, but it is to be noted that in section 195 the jurisdiction given to the court is not to review *all* final decisions, but to review final decisions of the Board of General Ap-

praisers in all cases "as to the construction of the law and the facts respecting the classification of merchandise and the rate of duties imposed thereon under such classification and the fees and charges connected therewith." The decision of the Board of General Appraisers in this case refusing the petition for remission of additional duties under section 489, *supra*, has nothing to do with the classification of merchandise or the rate of duty imposed thereon at all, but is distinctly limited to one question: Did the importer enter the merchandise at a value less than that returned upon final appraisement without any intention to defraud the revenue or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise?

It is to be noted in this connection that any petition for remission of additional duties is based upon the correctness and the finality of the order of the appraising officers finally appraising the merchandise and that its correctness neither is nor can be in any way impugned. The granting of the petition would not mean that the additional duties were incorrectly imposed, but only that they should be remitted. The further portion of section 195 reading:

> all appealable questions as to the law and regulations governing the collection of customs revenue

and that portion of section 198 which prescribes the procedure upon an appeal to review a decision

> as to the construction of the law and the facts respecting the classification of such merchan-

> dise and the rate of duty imposed thereon under such classification *or with any other appealable decision of said board*

clearly can apply only to such questions in which the Court of Customs Appeals has been given statutory jurisdiction to review. For no other reason, it is submitted, was the direct right to appeal specifically granted in the sections of the act of 1922, above quoted, than to make such questions "appealable questions" under said section 195. Without such a determination by Congress that such questions were appealable, the court would have had no jurisdiction to entertain appeals involving such questions.

II

The Court of Customs Appeals, being an inferior court, has no other or greater jurisdiction than that which Congress apportions to it. This has been held many times

Thus in *United States ex rel. Maxwell* v. *Barrett*, 135 Fed. 189, 193, it was said:

> National courts inferior to the Supreme Court are clothed with such powers as Congress has conferred upon them. The doctrine, negatively expressed, is that such courts have no other or greater jurisdiction than that which Congress apportions to them. The potential power ceded to the United States by section 2 of article 3 of the Constitution may be called into exercise by Congress, which possesses the right to establish inferior courts, and to partition among them all or any

> part of the judicial powers not vested in the Supreme Court. Courts created by Congress can exercise such powers only as are expressly conferred upon them. They can not take jurisdiction by mere implication. They have no jurisdiction by intendment. *Harrison* v. *Hadley*, 2 Dill. 229, Fed. Cas. No. 6137; *Ex parte Cabrera*, 1 Wash. C. C. 232, Fed. Cas. No. 2278; *Bank* v. *Roberts*, 4 Conn. 323, Fed. Cas. No. 934; *United States* v. *Alberty*, Hempst. 444, Fed. Cas. No. 14426. In *Turner* v. *Bank*, 4 Dall. 8, 1 L. Ed. 718, the court said: "A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace. *And the fair presumption is not, as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears.*" [Italics ours.]

In *United States* v. *Mar Ying Yuen*, 123 Fed. 159, at page 160, the court quotes Chief Justice Marshall in *United States* v. *More*, 3 Cranch, 171, as saying:

> If Congress has erected inferior courts without saying in which cases a writ of error or appeals should lie from such courts to this, your argument would be irresistible; but when the Constitution has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise, and Congress, under that power, has pro-

> ceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, *an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.* [Italics ours.]

See also *Kentucky* v. *Powers*, 201 U. S. 1, at page 24, where this Court said:

> We say, by any statute, because the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress. Chief Justice Marshall, speaking for this court, has said that "courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction." *Ex parte Bollman, &c.*, 4 Cr. 75, 93; *United States* v. *Hudson*, 7 Cr. 32, 33; *Cary* v. *Curtis*, 3 How. 236, 245; *McIntire* v. *Wood*, 7 Cr. 504, 506; *United States* v. *Eckford*, 6 Wall. 484, 488; *Sheldon* v. *Sill*, 8 How. 441, 449; *Jones* v. *United States*, 137 U. S. 202, 211; *The Sewing Machine Companies*, 18 Wall. 553, 571; *Holmes* v. *Goldsmith*, 147 U. S. 150, 158.

III

The decision of the Court of Customs Appeals was final

While the contention might be made herein that as the Court of Customs Appeals has directed a new trial in the instant case, the decision of that court

is not a final determination of the issues involved, and hence that this Court should refuse the writ of certiorari, it is apparent that if the Court of Customs Appeals has no jurisdiction to entertain such an appeal, the order granting the new trial is a nullity and the case in chief has been finally decided by the Board of General Appraisers. Certainly the question of the jurisdiction of the Court of Customs Appeals has been "finally" decided by that court itself and it is the final decision upon their jurisdiction that the Government desires to review.

It is true that this Court has held in several decisions that where an appellate court has remanded a case to the trial court for further proceedings in conformity with its opinion, the judgment of the appellate court was not final and hence not reviewable here. (*C. & N. Rwy. Co.* v. *Osborne*, 146 U. S. 354; *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608; *Rice* v. *Sanger*, 144 U. S. 197.) But in none of those cases was the appellate court called upon to determine its own jurisdiction, as in this case. The distinction is clearly brought out by this Court in *Macfarland* v. *Brown*, 187 U. S. 239, 245, where the Court said:

> In the present case no attack is made on the jurisdiction of either the Supreme Court of the District or *of the Court of Appeals.* [Italics ours.]

The finality of the judgment of the Court of Customs Appeals in the instant case must be tested by the principle laid down by Mr. Chief Justice Fuller

in *Hume* v. *Bowie*, 148 U. S. 245, where, at page 252, he said:

> This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. . . . The question involved is one of power, for if the court had power to make the order, when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. *If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable.* [Italics ours.]

See also *Phillips* v. *Negley*, 117 U. S. 665, 671, 672.

It follows, therefore, that if the Court of Customs Appeals was without jurisdiction to enter an order reversing the decision of the Board of General Appraisers and remanding the case for a new trial, that order was a final judgment and subject to review in this Court upon writ of certiorari.

CONCLUSION

It is respectfully submitted that the writ of certiorari for the purpose of reviewing the decision of the Court of Customs Appeals as to its jurisdiction should issue as prayed.

JAMES M. BECK,
Solicitor General.
WM. W. HOPPIN,
Assistant Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PETITIONER
v.
O. B. FISH
No. 653

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

MOTION BY THE UNITED STATES TO ADVANCE

The Solicitor General moves to advance the above-entitled case for hearing at the earliest date convenient to the Court. For the reasons given below, it is respectfully suggested that, if possible, the case be set for some date during the present term.

This case is here upon writ of certiorari and presents the important question whether the Court of Customs Appeals has jurisdiction to entertain appeals from decisions of the Board of General Appraisers granting or denying petitions for the remission of additional duties filed under Section 489 of the Tariff Act of 1922 (42 Stat. 858, c. 356).

Up to the time the Government filed its petition for writ of certiorari in this case (September last), some 1,900 petitions for remission of additional duties under Section 489, *supra*, had been filed with

the Board of General Appraisers. Of these over 1,200 were then pending undetermined. In a number of cases appeals have been taken to the Court of Customs Appeals. Decision of these appeals has been suspended by that court pending the determination of the jurisdictional question by this tribunal. A similar course will presumably avail as to future appeals.

To the end that the docket of the Court of Customs Appeals may be speedily relieved of this congestion, and that litigants may be promptly advised concerning the appealability to that court of cases like the present, it is respectfully urged that the hearing of this case be advanced.

Opposing counsel concur.

JAMES M. BECK,
Solicitor General.

JANUARY, 1925.

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In the Supreme Court of the United States

OCTOBER TERM, 1924

THE UNITED STATES, PETITIONER
v.
O. B. FISH
No. 653

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

BRIEF FOR THE UNITED STATES

STATEMENT OF THE CASE

This case is before the Court on a writ of certiorari to review a judgment of the United States Court of Customs Appeals, 12 Ct. Cust. Appls. — (Treas. Dec. 40315), reversing a decision of the Board of United States General Appraisers, Abstract 45757 (43 Treas. Dec. 651), which denied two petitions of an importer for the remission of additional duties.

THE FACTS

The importer herein, on November 9 and 11, 1922, entered certain merchandise at the port of New York. From the appraisal by the local appraiser at that port it appeared that the value stated in the entry was less than the appraised value, and thereby the importer became liable to pay addi-

tional duties under section 489 of the tariff act of 1922 (42 Stat. 858, 962) accruing at the time of entry because of the undervaluation.

Thereafter the importer, under the provisions of section 489, *supra,* filed petitions with the Board of General Appraisers praying for a remission of said additional duties. On March 20, 1923, after a trial, the Board of General Appraisers rendered its decision denying the petitions. (R. 11.) Thereafter, on April 5, 1923, the importer filed an application for the review of said decision by the United States Court of Customs Appeals, basing his application on sections 195 and 198 of the Judicial Code (36 Stat. 1145, 1146), as amended (38 Stat. 703).

Upon such appeal coming on to be heard, the United States moved to dismiss the appeal upon the ground that the Court of Customs Appeals had no jurisdiction to entertain the same. (R. 13.) That court, after argument, denied the motion to dismiss, considered the case upon the merits and reversed the judgment of the Board of General Appraisers (R. 15.)

ARGUMENT

The question for determination is purely a question of the jurisdiction of the United States Court of Customs Appeals. Succinctly stated, the issue is: Has the Court of Customs Appeals jurisdiction to entertain appeals from decisions granting or denying petitions for the remission of additional

duties filed under section 489 of the tariff act of 1922?

I

The decision of the Board of General Appraisers on a petition for remission of additional duties is final and conclusive and not subject to review

The Court of Customs Appeals bases its decision denying the motion of the Government to dismiss on sections 195 and 198 of the Judicial Code, which, so far as material, read:

> (195) The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases * * *.
>
> (198) If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under

> such classification, or with any other appealable decision of said board, they, or either of them, may within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision * * *.

The United States submits that the Court of Customs Appeals had no jurisdiction to entertain an appeal from the decision of the Board of General Appraisers in this case. Being an inferior United States Court, it has only such jurisdiction as has been specifically granted to it by statute, and nothing in the two sections above set forth in which the jurisdiction of the Court of Customs Appeals is delimited grants jurisdiction in such a case.

The tariff act of 1922 for the first time has granted importers a method of relief from the imposition of additional duties in section 489. That section, so far as material, reads as follows (42 Stat. 962):

> (489) * * * Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of a manifest clerical error, upon the order of the Secretary of the Treasury, *or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that re-*

turned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise.

* * *

Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. [Italics ours.]

The Court of Customs Appeals in its decision holds that the decision of the Board of General Appraisers on such a petition is a final decision, and under the language of section 195, *supra*, the appellate jurisdiction of that court as to " final decisions by [the] Board of General Appraisers in all cases as to the construction of the law and the facts " and " all appealable questions as to the laws and regulations governing the collection of customs revenues " is sufficient to give that court jurisdiction.

Nothing in section 489 of the tariff act of 1922 specifically grants jurisdiction to the Court of Customs Appeals. This becomes important when it is noted that in other cases in which the tariff act of 1922 has prescribed rights to the importers additional to those theretofore given to them under prior acts it has in each case specifically provided for an appeal to the Court of Customs Appeals.

Thus, in section 316 of the act of 1922, providing for certain powers of the President and of the

United States Tariff Commission, an appeal is authorized from the findings of such Commission upon questions of law to the U. S. Court of Customs Appeals.

In section 501 of the act of 1922, providing the method of reappraisement of merchandise, it is stated that the decision of the Board of General Appraisers thereunder shall be final and conclusive upon all parties unless appeals shall be taken to the Court of Customs Appeals in accordance with section 198 of the Judicial Code, above quoted.

In section 515 of the act of 1922 the right of appeal to the Court of Customs Appeals is given from decisions of the collector, as set forth in section 514 of the act, which latter section has broadened the right of protest in many cases, including decisions of the collector as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury); his decisions excluding merchandise under any provision of the customs law; his refusal to pay any claim for drawback, as to none of which was there a right to protest under prior acts.

In section 516 (c) of the act of 1922 the right of either party to appeal to the Court of Customs Appeals is given in cases where an American producer has filed a protest, which is a new right never before given in tariff acts.

In section 517 of the act of 1922 a right of appeal to the Court of Customs Appeals is given where a penalty has been imposed upon a protestant for filing a frivolous protest.

Under section 563 of the act of 1922 a right of appeal is given to either party to the Court of Customs Appeals on claims for allowance for injury or destruction of merchandise while in bonded warehouse or other customs custody.

Thus it is noted that in cases where Congress intended the Court of Customs Appeals to have jurisdiction over new rights granted to importers in the tariff act of 1922 specific jurisdiction over appeals involving such rights has been distinctly granted.

Necessarily the Judicial Code, sections 195 and 198, *supra,* could not have been intended specifically to apply to petitions for remission of additional duties, because at the time of the passage of the Judicial Code there was no such right reserved to an importer.

It seems clear, therefore, that there is no direct grant of authority to the Court of Customs Appeals to review such a decision. The court bases its determination upon the fact that the decision of the Board of General Appraisers is a final decision, but it is to be noted that in section 195 the jurisdiction given to the court is not to review *all* final decisions, but to review final decisions of the Board of General Appraisers in all cases " as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith." The decision of the

would not be subject to review unless such right were specifically given.

The case of *Brown* v. *United States,* 12 Ct. Cust. Appls. — (T. D. 40026; 45 Treas. Dec. 199) cited by the Court of Customs Appeals as involving the same issue as is raised in the instant case is easily distinguishable. There the question was presented: Has the Board of General Appraisers jurisdiction to grant a petition for the remission of additional duties where the entry was made, and hence the additional duty had accrued, prior to the passage of the tariff act of 1922? The Board denied its jurisdiction and the Court of Customs Appeals correctly held it had jurisdiction to review the determination of the Board under the language in section 195 of the Judicial Code providing that the Court of Customs Appeals shall have jurisdiction of "all appealable questions as to the *jurisdiction* of said board." Here, however, there is no question as to the jurisdiction of the Board of General Appraisers. They exercise the jurisdiction specifically granted to them in section 489 of the act of 1922.

II

The Court of Customs Appeals, being an inferior court, has no other or greater jurisdiction than that which Congress apportions to it

Thus, in *United States ex rel. Maxwell* v. *Barrett,* 135 Fed. 189, 193, it was said:

> National courts inferior to the Supreme Court are clothed with such powers as Con-

gress has conferred upon them. The doctrine, negatively expressed, is that such courts have no other or greater jurisdiction than that which Congress apportions to them. The potential power ceded to the United States by section 2 of article 3 of the Constitution may be called into exercise by Congress, which possesses the right to establish inferior courts, and to partition among them all or any part of the judicial powers not vested in the Supreme Court. Courts created by Congress can exercise such powers only as are expressly conferred upon them. They can not take jurisdiction by mere implication. They have no jurisdiction by intendment. *Harrison* v. *Hadley,* 2 Dill. 229, Fed. Cas. No. 6137; *Ex Parte Cabrera,* 1 Wash. C. C. 232, Fed. Cas. No. 2278; *Bank* v. *Roberts,* 4 Conn. 323, Fed. Cas. No. 934; *United States v. Alberty,* Hempst. 444, Fed. Cas. No. 14426. In *Turner* v. *Bank,* 4 Dall. 8, 1 L. Ed., 718, the court said: "A Circuit Court, however, is of limited jurisdiction, and has cognizance, not of cases generally, but only of a few specially circumstanced, amounting to a small proportion of the cases, which an unlimited jurisdiction would embrace. *And the fair presumption is not,* as with regard to a court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather that a cause is without its jurisdiction till the contrary appears." [Italics ours.]

In *United States* v. *Mar Ying Yuen,* 123 Fed. 159, at page 160, the court quotes Chief Justice Marshall in *United States* v. *More,* 3 Cranch, 159, 171, as saying:

> " If Congress has erected inferior courts, without saying in what cases a writ of error or appeal should lie from such courts to this, your argument would be irresistible; but when the Constitution has given Congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and Congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, *an exception of all other cases is implied. And this court is as much bound by an implied as an express exception.*" [Italics ours.]

See also *Kentucky* v. *Powers,* 201 U. S. 1, at page 24, where this Court said:

> We say, by any statute, because the subordinate judicial tribunals of the United States can exercise only such jurisdiction, civil and criminal, as may be authorized by acts of Congress. Chief Justice Marshall, speaking for this court, has said that " courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, can not transcend that jurisdiction."

Ex parte Bollman, etc., 4 Cr. 75, 93; *United States* v. *Hudson,* 7 Cr. 32, 33; *Cary* v. *Curtis,* 3 How. 236, 245; *McIntire* v. *Wood,* 7 Cr. 504, 506; *United States* v. *Eckford,* 6 Wall. 484, 488; *Sheldon* v. *Sill,* 8 How. 441, 449; *Jones* v. *United States,* 137 U. S. 202, 211; *The Sewing Machine Companies,* 18 Wall. 553, 571; *Holmes* v. *Goldsmith,* 147 U. S. 150, 158.

III

The decision of the Court of Customs Appeals was final as to its jurisdiction and hence the same may be properly reviewed by this court as a final decision

While the contention might be made herein that as the Court of Customs Appeals has directed a new trial in the instant case, the decision of that court is not a final determination of the issues involved, it is apparent that if the Court of Customs Appeals has no jurisdiction to entertain such an appeal, the order granting the new trial is a nullity and the case in chief has been finally decided by the Board of General Appraisers. Certainly the question of jurisdiction of the Court of Customs Appeals has been "finally" decided by that court, and it is the final decision upon their jurisdiction that the Government desires to review.

It is true that this Court has held in several decisions that where an appellate court has remanded a case to the trial court for further proceedings in conformity with its opinion, the judgment of the appellate court was not final, and hence not review-

able. (*C. & N. Rwy. Co.* v. *Osborne,* 146 U. S. 354; *Meagher* v. *Minnesota Thresher Mfg. Co.,* 145 U. S. 608; *Rice* v. *Sanger,* 144 U. S. 197.) But in none of those cases was the appellate court called upon to determine its own jurisdiction, as in this case. The distinction is clearly brought out by this Court in *Macfarland* v. *Brown,* 187 U. S. 239, 245, where it was said:

> In the present case no attack is made on the jurisdiction of either the Supreme Court of the District or *of the Court of Appeals.* [Italics ours.]

The finality of the judgment of the Court of Customs Appeals in the instant case must be tested by the principle laid down by Mr. Chief Justice Fuller in *Hume* v. *Bowie,* 148 U. S. 245, where, at page 252, he said:

> This case comes before us on a motion to dismiss the writ of error for want of jurisdiction, upon the ground that the judgment brought here by the writ is not a final judgment. * * * The question involved is one of power, for if the court had power to make the order, when it was made, then it was not a final judgment, as it merely vacated the former judgment for the purpose of a new trial upon the merits of the original action. *If the court had no jurisdiction over that judgment, the order would be an order in a new proceeding, and in that view final and reviewable.* [Italics ours.]

See also *Phillips* v. *Negley*, 117 U. S. 665, 671, 672.

It follows, therefore, that if the Court of Customs Appeals was without jurisdiction to enter an order reversing the decision of the Board of General Appraisers and remanding the case for a new trial that order was a final judgment and subject to review in this Court upon writ of certiorari.

The decision of the United States Court of Customs Appeals should be vacated and set aside as void for want of jurisdiction.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

WILLIAM W. HOPPIN,
Assistant Attorney General.

SAMUEL M. RICHARDSON,
Special Attorney, of Counsel.

APRIL, 1925.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

THE UNITED STATES, Petitioner, *v.* O. B. FISH, Respondent.	No. 653.

On Petition for Writ of Certiorari to the United States Court of Customs Appeals.

BRIEF FOR RESPONDENT OPPOSING PETITION.

The petitioner has applied for a writ of certiorari directed to the United States Court of Customs Appeals to review a decision and judgment rendered by that court on the 28th day of June, 1924, which decision denied the motion of the United States to dismiss the appeal to the Customs Court, reversed the decision of the Board of General Appraisers rendered under Section 489 of the Tariff Act of 1922 (42 Stat., 858, c. 356) and remanded the

case for a new trial. The ground of the application is that the Court of Customs Appeals did not have jurisdiction.

Respondent asks that the petition be denied on the ground that the decision below was not a final decision, that the issue involved is not of such importance as to warrant review, and that the court below had jurisdiction by virtue of Sections 195 and 198 of the Judicial Code (36 Stat., 1087, c. 231) as amended by the Act of August 22, 1914 (38 Stat., 703, c. 267).

JURISDICTION.

The petition for a writ of certiorari should be denied because the decision of the Court of Customs Appeals sought to be reviewed was not a final decision.

The decision of the Court of Customs Appeals, a copy of which appears as appendix to this brief, denied a motion to dismiss the importer's appeal, reversed the judgment of the Board of Appraisers and remanded the case for a new trial. In *Chicago & Northwestern Railway Co.* v. *Osborne*, 146 U. S., 354, this court denied an application for a writ of certiorari to review a decision of the Circuit Court of Appeals reversing the judgment of the court below and remanding the case for further proceedings in accordance with its opinion. In *Parsons* v. *Chicago & Northwestern Railway Co.*, 167 U. S., 447, the Court states (p. 454) that the denial was on the ground that there had been no final judgment.

In *Macfarland* v. *Brown*, 187 U. S., 239, and *Hume* v. *Bowie*, 148 U. S., 245, cited by the United States, an appeal

and a writ of error, respectively, were dismissed for the same reason. Those cases involved no question of jurisdiction, and it is true that the Court took occasion to distinguish the cases from *Phillips* v. *Negley*, 117 U. S., 665, also relied on here by the United States. While a question of jurisdiction was involved in the latter case, the question was different from that here presented and the case is not controlling. In *Phillips* v. *Negley* the primary question of jurisdiction was whether the Supreme Court of the District of Columbia at special term, the court of original jurisdiction, had power to reopen a final judgment at law after the close of the term at which it was entered. The decision of this Court seems to carry the plain implication that the Court would not have entertained the writ of error in *Phillips* v. *Negley* if the court of original jurisdiction had power. Where this Court said (pp. 671, 672): "If, on the other hand, the order made was made without jurisdiction on the part of the Court making it, then it is a proceeding which must be the subject of review by an appellate court," the reference was to the order of the court of original jurisdiction.

In the present case there is no question that the Board of General Appraisers originally had jurisdiction of the petition for remission. Their decision was reversed because they did not exercise their jurisdiction in the mode prescribed by the statute. It is plain that the decision of the Court of Customs Appeals is not a final decision and was not intended to be a final decision. The court did not even pass upon both of the questions submitted to it on the merits. It remanded the case because of the palpable error of the Board of Appraisers. Its order cannot be called an "order in a new proceeding" (to quote the language of *Hume* v. *Bowie*, *supra*), because

the Customs Court is appellate only. It is plain that if, after the new trial, the importer's petitions for remission should ultimately be denied, the question of the jurisdiction of the Court of Customs Appeals could not be raised in this Court. To use the language of *Macfarland* v. *Brown, supra,* "The further proceeding may possibly reach such a result that neither party will desire an appeal." An affirmance in this case, furthermore, would not terminate the litigation between the parties on the merits of the case, which by *Bostwick* v. *Brinkerhoff*, 106 U. S., 3, is made a criterion of the finality of a decision.

IMPORTANCE.

The importance of the issue herein is not such as to warrant a review by this Court.

Under Section 489 the duty of the Board of General Appraisers in remission cases is merely to find a fact, and the nature of their jurisdiction is not such as to afford grounds for appeal except in a restricted class of cases where the Board goes outside the statute.

Although, as the United States points out, nineteen hundred petitions for remission have been filed and almost seven hundred have been decided by the Board of General Appraisers, there have only been about thirty appeals to the Court of Customs Appeals. Eight of these involved the question whether the remission remedy extended to cases where entry had been made under the previous tariff act and are controlled by the decision in *Wm. A. Brown & Co., et al., petitioners,* v. *United States*, No. 946, October term, 1923, in which case a petition for a writ of certiorari was denied by this Court on April 28, 1924. Most of the

other cases involve the question whether a petition for remission can be denied on the ground of lack of due diligence when the element of fraud is not present. This was the question which was at issue in the present case. The first appeal from a decision of the Board of General Appraisers in a remission case, involving other than jurisdictional questions, was taken by the Government, *United States* v. *Macy*, Customs Court No. 2247. The last four appeals to the Court of Customs Appeals in remission cases were also taken by the Government. In the instant case the amount of additional duties for undervaluation is about $500.

In any event the question involved is essentially one of practice. The Board of General Appraisers acts through three independent sub-boards whose decisions are often at variance. In view of the enlarged language of Section 514 of the Tariff Act of 1922, and the absence in Section 489 of language making the decision of the Board in remission cases final, it is not to be presumed that Congress intended that there should be no method of harmonizing these divergent decisions. It is to the interest of the customs service, the importing community and the public at large, that there should be a review and that the method of review be as direct and expeditious as possible.

THE MERITS.

The Court of Customs Appeals has jurisdiction to review decisions of the Board of General Appraisers on petitions for remission, because such cases present "appealable questions as to the laws and regulations governing the collection of the Customs revenues" within the meaning of Section 195 of the Judicial Code, and because such decisions are "any other appealable decision of said Board," within the language of Section 198. Before the Tariff Act of 1922 was passed it was held that any final decision of the Board of General Appraisers was appealable except when an appeal had been denied by statute.

I.

The decision of the Court of Customs Appeals now sought to be reviewed follows the decision of the same court in the case of *Wm. A. Brown & Co., et al.* v. *United States*, above referred to. That decision is to be found in T. D. 40026, Treasury Decisions, Vol. 45, No. 8, Feb. 21, 1924, page 57. The court said:

> "Sections 195 and 198 of the Judicial Code adopted March 3, 1911, embody the law as originally found in sub-section 29 of section 28 of the tariff act of August 5, 1909, as follows:
>
> "Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under

such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; * * *

"Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *

"It will not be contended that these sections have been repealed, or that they have in any way been modified or changed by the act of 1922. It seems to be the position of the Government that appeals under the act of 1922 are only permitted in the instances specified in the act. Such a contention nullifies the effect of the code above referred to. The action of the board in dismissing the petition for rehearing is a final decision 'as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith,' and such action on the part of the board raises 'an appealable question as to the jurisdiction of said board,' and also raises an appealable question 'as to the laws and regulations governing the collection of customs revenues.' Section 198 gives the importer, if he is not satisfied with the decision of the Board of General Appraisers on 'any other appealable decision,' an appeal to this court 'for a review of questions of law

and fact involved in such decision.' This court has taken jurisdiction in cases involving final decisions on shortage, clerical error, entered values, additional duties, amendment of entry, admissibility of evidence, and various other related questions, having no authority for the procedure other than the sections of the statute above referred to. This court has not taken jurisdiction in any case where the statute indicates that it has no right of review. The motion by the Government to dismiss the appeal is, therefore, overruled."

The Customs Court decided the case on the merits in accordance with the Government's contention and the importers applied to this Court for a writ of certiorari, which application was denied by this Court on April 28, 1924. The United States, respondent, called the attention of this Court to the fact that the issue as to the jurisdiction of the Court of Customs Appeals was an issue in the case. The following language appears on page 5 of the brief for the United States in that case:

"Has the United States Court of Customs Appeals jurisdiction to review a finding of the Board of United States General Appraisers made on a petition for the remission of additional duties under said section 489?

"This issue was raised before the Court of Customs Appeals by a motion duly filed on behalf of the United States to dismiss the importer's appeal from a decision of the Board of General Appraisers which had dismissed the importer's petition on the ground that it was without jurisdiction in the matter. This motion was denied by the Court of Customs Appeals.

"The respondent submits that in the event of a writ of certiorari being granted herein, the question as to the jurisdiction of the Court of Customs Appeals over

appeals involving the remission of additional duties under said section 489 is properly before this Court for consideration, notwithstanding the fact that the final decision in the instant case was in favor of the United States.

"If it shall be determined by this Court that a writ of certiorari be granted herein, the respondent requests that a review shall be had of the jurisdiction of the Court of Customs Appeals to entertain any appeal from decisions of the Board of General Appraisers on petitions for remission filed under said section 489."

II.

Under the Tariff Act of August 5, 1909 (36 Stat., 11, c. 6) by which statute the decision of the Board of General Appraisers was made final in reappraisement cases, the Court of Customs Appeals said:

> "We think, however, that no purpose on the part of Congress to vest a jurisdiction in the board over cases not reviewable by this court (except in appraisements) can be found if the terms of the act as a whole be considered."
>
> *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. Appls., 373.

This is precisely the view of this Court as to the Circuit Court's jurisdiction (prior to the organization of the Court of Customs Appeals) to entertain appeals from decisions of the Board of General Appraisers under the Customs Administrative Act of June 10, 1890 (26 Stat. 131, C. 407) The Court said:

> "In other words the right of review by the Circuit Court is co-extensive with the right of appeal to the board as to all matters except the *dutiable value* of

the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive."

United States v. *Klingenberg*, 153 U. S., 93, 102.

It must be presumed that Congress enacted the Tariff Act of 1922 in the light of the previous decisions as to the scope of the jurisdiction of the appellate tribunal. There is not the slightest suggestion in Section 489 that the decisions of the Board of General Appraisers are to be final and so excepted from the jurisdiction of the Appellate Court.

III.

The provisions in the Tariff Act of 1922 relating to appeals, which are cited for the United States, petitioner, do not carry the implication there is to be no appeal in remission cases.

Only Sections 316 and 517 affirmatively grant a right of appeal and form the basis for the appellate court's jurisdiction. In Section 316 this was necessary because the Judicial Code gave the Court of Customs Appeals no jurisdiction over appeals from decisions of the United States Tariff Commission. In Section 517 the right of appeal had to be given where a penalty has been imposed for filing a frivolous protest, because the subject-matter does not constitute a question as to the laws and regulations governing the collection of the customs revenue under the Judicial Code.

Sections 501, 515, 516 (c) and 563 do not confer appellate jurisdiction, but merely recognize the existing jurisdiction by providing for the finality of decisions of the

Board of General Appraisers when an appeal is not taken as provided by the Judicial Code. In the case of Section 501 there is the additional purpose of limiting the appellate jurisdiction in reappraisement cases to questions of law. Sections 514 and 515 are merely re-enactments of previous statutes originally intended to do away with the common law remedy in use before the passage of the Customs Administrative Act of June 10, 1890.

IV.

In any event this particular case involved an appealable question as to the jurisdiction of the Board of Appraisers within the meaning of Section 195 of the Judicial Code.

Under Section 489 of the Tariff Act of 1922 the only function of the Board of General Appraisers is to pass upon the question of the presence or absence of fraud. In the present case the Board went outside the scope of its jurisdiction and determined the case on the question of carelessness, and that is why the Court of Customs Appeals reversed the judgment of the Board.

IN CONCLUSION.

For the foregoing reasons respondent asks that the petition for a writ of certiorari be denied.

ALLAN R. BROWN,
Attorney for Respondent.

APPENDIX.

Decision of Court of Customs Appeals below.
Treasury Decisions, Vol. 46, No. 3, July 17, 1924, page 34.

(T. D. 40315)

Remission of additional duties

FISH *v.* UNITED STATES (No. 2266)

1. CONSTRUCTION, SECTIONS 489, TARIFF ACT OF 1922, AND 195 AND 198, JUDICIAL CODE.

Under sections 195 and 198, Judicial Code, the Court of Customs Appeals has jurisdiction to review the action of the Board of United States General Appraisers upon a petition filed under section 489, tariff act of 1922, for the remission of additional duties; and this review covers both law and fact. Such decision by the board is final, and not interlocutory.

2. EVIDENCE, SUFFICIENCY ON REVIEW—SECTION 489, TARIFF ACT OF 1922.

Upon review by this court of the action by the Board of United States General Appraisers upon a petition filed under section 489, tariff act of 1922, for the remission of additional duties, such action will be reversed if clearly contrary to the weight of the evidence, and will not be affirmed merely because founded upon some evidence. The language of the section, "satisfactory evidence," does not mean satisfactory to the board, but means the amount of proof which would ordinarily satisfy an unprejudiced and reasonable mind.

3. CARELESSNESS NOT FRAUD.

Carelessness in making entries is not sufficient to

impute to a petitioner for remission of additional duties under section 489, tariff act of 1922, an intention to defraud the revenue or to conceal or misrepresent the facts or to deceive the appraiser as to the value of the merchandise.

UNITED STATES COURT OF CUSTOMS APPEALS, JUNE 28, 1924.

Appeal from Board of United States General Appraisers, Abstract 45695

[Reversed and remanded.]

ALLAN R. BROWN for appellant.

W. W. HOPPIN, Assistant Attorney General (PELHAM ST. GEORGE BISSELL and ABRAHAM H. GOODMAN, special attorneys, of counsel), for the United States.

[*Oral argument Mar. 18 and 19, 1924, by Mr. Brown and Mr. Hoppin*]

Before MARTIN, Presiding Judge, and SMITH, BARBER, BLAND, and HATFIELD, Associate Judges

BLAND, Judge, delivered the opinion of the court:

This is an appeal from a decision of the Board of General Appraisers denying two petitions filed under section 489 of the tariff act of 1922 with relation to additional duties.

The petitions prayed for orders or findings of the board that the importer entered the merchandise at a less value than the final appraised value thereof without intent to defraud the revenues of the United States, or to conceal or misrepresent the facts, or to deceive the appraisers as to the value of the merchandise.

Section 489 of the tariff act of 1922 reads as follows:

SEC. 489. Additional duties. * * * Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of manifest clerical error, upon the order of the Secretary of the Treasury, or in any case upon the findings of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. * * *

Upon the making of such order or finding the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. * * *

The importer purchased at Hongkong the following quantities of plaited peacock flues at the following prices and on the following dates:

Fifty pounds, at $26 per pound, July 9, 1922.
Forty-eight pounds, at $28 per pound, July 27, 1922.
Fifty pounds, at $28 per pound, August 20, 1922.
Thirty-six pounds, at $23 per pound, August 30, 1922.
Twenty-seven pounds, at $32 per pound, August 30, 1922.

The importations were entered at the customhouse by the importer's broker, and the entered value stated in the entries was the price paid for each lot of flues, which was also the invoice price. All of the goods were appraised at $32 per pound. Whereupon the importer filed petitions under section 489.

In support of the petitions importer at the trial brought

forward the importer Strauss, who testified that peacock flues are small feathers on the sides of the stems of peacock feathers; that they are put through a machine or needle process in China; that he purchased the goods by cable; that he was not concerned with the market in China except in the instances when he was trying to buy; that when he bought he got quotations by cable, and that he made counter offers; that the method of preparing these goods for the market has prevailed for the last two years, and that at times there is a big demand for them; that the market fluctuates, and during the last two years has fluctuated as much as 50 per cent; that the price on yesterday or two days ago would not necessarily be the price of the goods to-day; that he has been importing the goods for two years, and that this was the first instance in which there had been an advance in value by the appraiser. He was not asked if he had made any entries other than the ones in question under the act of 1922. He stated he made the purchases on the dates and for the prices set out above, and when the goods arrived he sent the papers to his customs brokers with no instructions, and that they entered the goods according to the consular invoices; that in doing so there was no intention on his part to mislead the appraiser; that he did nothing affirmatively or negatively intended to mislead the appraiser; that he did not concern himself about the market value at the time; that in making the entry at the price he did there was no intention on his part to defraud the revenues of the United States, and that he gave the broker the invoice and told him to make the entry and that in so doing he did not intend to deceive the appraiser; that during the past two years peacock flues have been a common commodity; that the shipment was by parcel

post and the entries were approximately of the same date, November 9 and 11; that the invoice, dated at Hongkong, September 26, has all the prices on it; that the broker did not make the entry in his own name but did prepare the papers; that he had been importing since 1895; that he made no effort to ascertain what the value was on the date of exportation of the goods; that if he had made such effort he would have been required to cable in every instance on every entry he made. This was all the evidence there was.

The Board of General Appraisers denied the petition apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent.

The Government in this court moved to dismiss the appeal on the ground that there was no statute giving the right to appeal.

Sections 195 and 198 of the Judicial Code, adopted March 3, 1911, read as follows:

> SEC. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues. * * *
>
> SEC. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector

> or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *

In *Brown & Co. et al* v. *United States* (12 Ct. Cust. Appls. ——; T. D. 40026), an appeal was taken from the decision of the board dismissing the petition for an order under section 489, which decision held that the board was without jurisdiction to consider the petition. On appeal to this court, we held that the action of the board in dismissing the petition for rehearing was a final decision "as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith," and was an appealable question "as to the jurisdiction of said board," and also raised an appealable question as "to the laws and regulations governing the collection of customs revenues."

It may be contended that the Brown case, *supra*, deciding a question of the jurisdiction of the board, is not in point with the case at hand. We think otherwise. The action of the Board of General Appraisers upon the petition for an order for the remission of duties is, under the same sections of the Code, a final decision "as to the construction of the law * * * respecting the rate of duty imposed and the fees and charges connected therewith," and such action on the part of the board also, as in the Brown case, raises an appealable question as to

the laws and regulations governing the collection of customs revenues.

Under section 195, the Court of Customs Appeals is given exclusive appellate jurisdiction to review "final decisions by the Board of General Appraisers in all cases as to the construction of law and facts" * * * in "all appealable questions as to the laws and regulations governing the collection of customs revenues."

Section 198 provides that the importer may apply to the Court of Customs Appeals for a review of the construction of law and facts involved in a decision of the Board of General Appraisers or "any other appealable decision of the board."

It will be noted that in section 195 the words "final decisions" are used, and in section 198 the word "decision" is used. Under either section above referred to, this court is authorized to review the action of the board involved in this case. The action of the board denying the petition is a final decision; it is the end of the issue involved in the hearing in that case as far as the Board of General Appraisers is concerned. The act of 1922 gives the board a new duty to perform, and in such duty they have exclusive original jurisdiction. Their action is not temporary or subject to change or modification by them; it is final and conclusive as between the parties. If the board in this case had decided that there was no intent to defraud the revenues, etc., and had made an order or finding accordingly, could it have been contended that the order or finding was not final and was not a decision standing out independent of any other issue that might arise from the entry? It may be contended that the action of the board on petitions for remission like the one at hand is in the nature of an interlocutory order. In-

terlocutory means, "Not final, provisional, temporary." (Corpus Juris, 36, p. 268.)

> Interlocutory orders are not orders which finally settle the main issue in the case and dispose of the litigation. The final decision ofttimes is in no way related to the interlocutory decision. An interlocutory decision is an incident of the case and only settles some intervening matter related to the main case. (Corpus Juris, *Ibid.*, and cases cited.)

What issue could the board have in hand in this case to which their action on the petition would be interlocutory? If there had been no appeal, the collector would have liquidated the entry, and as far as the Board of General Appraisers was concerned, the whole matter would have been ended. The motion of the Government to dismiss the appeal of appellant is *overruled.*

Appellant assigns as error of law and fact the failure of the board to find that the entry of the merchandise by the importer at a less value than that returned upon final appraisement was without any intention to defraud the revenues of the United States or conceal or misrepresent the facts of the case or deceive the appraiser as to the valuation of the merchandise. We think this assignment of error squarely presents the question as to whether upon appeal this court is authorized to review the evidence in the hearing before the board. For the reasons heretofore assigned in connection with the Government's motion to dismiss the appeal, and in conformity with the sections of the statute heretofore quoted, we think it is our duty to review the evidence introduced before the board.

It is contended that such review must be only as to such matters of evidence as would amount to questions of law.

In other words, it is contended that, if there is any evidence to support the finding of the board, this court cannot disturb its finding, and that, if there was no evidence to sustain its finding, we would be justified (assuming we have the right to review) in disturbing the finding of the board purely as a matter of law.

In the early history of the court, in a very well considered case, Presiding Judge Montgomery rendering the decision of the court clearly stated the rule applicable to this issue. In United States *v.* Riebe (1 Ct. Cust. Appls. 19; T. D. 30776), on a question of classification and the question as to whether this court has the power to review questions of fact, the court decided that it did have the right to review the facts, and furthermore, applied the rule in the trial of equity cases rather than the law rule. They were there construing section 198, which is now before us, and used the following language:

> A careful reading of this statute satisfies us that it was the intent of Congress that this court should have the power to review questions of fact. The circumstance that all the evidence before the board is competent evidence and that all is required to be returned to this court indicates that such was the intent.
>
> We think the proper practice is analogous to that which obtains on appeals in equity cases in the State or Federal courts. That rule has been stated in various ways in the different courts, but the courts all recognize the better opportunities of a trial court to judge of the credibility of witnesses, and hesitate for this reason to disturb the conclusion except in a case where the evidence is clearly inconsistent with the conclusion reached by the trial court. The rule as stated in the Blankensteyn case (56 Fed. 474) is as follows:
>
> "The circuit court should not undertake to disturb

the findings of the board upon doubtful questions of fact, and especially as to questions of fact which turn upon the intelligence and credibility of witnesses who have been produced before the board. But when the finding of fact is wholly without evidence to support it, or when it is clearly contrary to the weight of evidence, it is the duty of the circuit court to disregard it."

We think this a fair and correct statement of the rule which should govern us under the organic statute above quoted.

This leads us to the inquiry as to whether the conclusion of the board in this case is clearly against the weight of evidence. We have not been able to satisfy ourselves that the Government has presented such a case. (P. 20.)

The rule of law that, if there is any evidence to support the finding of the trial tribunal, it cannot be disturbed on review is not applicable to the review by this court of proceedings before the board on petitions filed under paragraph 489 of the act of 1922, but the rule in the trial of equity cases, as laid down by this court in the Riebe case, *supra*, must be applied.

A casual reading of section 489 might lead to the hasty conclusion that the words "upon petition filed and supported by satisfactory evidence under such rules as the board may prescribe" left action upon the petition to the arbitrary discretion of the board, and that "satisfactory evidence" might mean *satisfactory to the board.* This was not the intention of Congress, and the courts have not so construed similar provisions.

In United States *v.* Lee Huen (118 Fed. 442) the court was construing the following provision from the statutes:

That any Chinese person or persons of Chinese de-

> scent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such persons shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

and the court there said:

> In this connection it should be remembered that credible and undisputed evidence amounts to proof, and must be accepted as such. What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached, and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied.

The court quoted Stephens' Digest and Greenleaf on Evidence, as defining "satisfactory evidence," as follows:

> Satisfactory or sufficient evidence: That amount or weight of evidence which is adapted to convince a reasonable mind. (Steph. Dig. Ev., 2d Ed., p. 3, note 2.)
>
> By "satisfactory evidence," which is sometimes called "sufficient evidence," is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never

> be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest. (Greenleaf, Sec. 2.)

Observing the above meaning of the word "satisfactory," the board had the right to determine whether the evidence introduced by the importer was "satisfactory," and this court on appeal guided by the principles heretofore set out must pass upon the question as to whether the finding of the board that the evidence was *not satisfactory* was correct.

In passing upon this question we think it is proper to have in mind that in tariff laws preceding the act of 1922, there was no provision for remission of additional duties except for manifest clerical error. By imposing additional duties for undervaluation, Congress sought to prevent an undervaluation which might lead to defrauding the customs revenues or to concealing or misrepresenting the facts of the case, or to deceiving the appraiser as to the valuation of the merchandise. The act of 1922, recognizing that there were instances of undervaluation which were free from taint of fraud or ulterior motive, liberalized the law under which importers could obtain remission of additional duties. It, however, put upon the importer the burden of showing by satisfactory evidence affirmatively that, in entering his merchandise at a price lower than the appraised value, he did not intend the things the Government had sought to prevent in the enactment of the additional duties provisions.

While there may be no legal presumption of fraud or intent to deceive, etc., in the fact that additional duties

have been levied or that an undervaluation had been made, Congress, recognizing the possibility and even the probability of the existence of such conditions, placed the burden upon the importer to show affirmatively that such did not exist. The witnesses with whom the importer must make this showing are before the board and on questions of intent to defraud and deceive, the appearance of the witness, his conduct and manner of giving evidence must necessarily be given great weight by the board in determining the honesty and sincerity of the importer. It might have been well for Congress to have left the matter entirely to the discretion of the board, or to have prescribed that in reviewing facts the rule of law and not the rule in the trial of equity cases should be applied in appeals to this court. This court cannot supply legislation, and under the rule in the trial of equity cases, we must review the evidence with the view of determining as to whether it was "satisfactory." For the reasons heretofore set out, this court will be slow to disturb the finding of the board on the weight of the evidence on petitions under this section of the statute. Their better opportunity for weighing the evidence properly before them in this particular jurisdiction where fraud, concealment, and deceit are involved, is recognized by this court, and when reviewing the facts upon which their decision is based will be given great weight. (Creamer *v.* Bivert, 214 Mo. 473; 113 N. W. 1118.)

In the present case, however, as above observed, we find that the Board of General Appraisers denied the petition of the importer apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent. The opinion below closes with the following state-

ment: "The most that can be said about the importer was that he was very careless. Sometimes neglect is as bad in law as acts of commission."

We need not here discuss the question raised by the fact that the importer failed to call as a witness the broker who made the entry, for we are satisfied that the judgment of the board must be reversed upon the ground that apparently the importer was denied a remission of the additional duties chiefly if not entirely upon the ground that he was very careless in the transaction relating to the making of the entry. As we have stated above the burden rested upon the importer to establish by satisfactory evidence that his action was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. If the importer in any such case establishes these facts as aforesaid he becomes entitled thereby to the findings of the board in his favor as prescribed by the statute, and he would not forfeit that right because of mere carelessness alone upon his part in the transaction.

In the present case, if we construe the board's opinion correctly, the importer's petition was denied upon the ground that if the importer was not guilty of fraud, he was at least very careless. We do not regard this finding as an answer to the issue raised by the importer's petition, or as a sufficient ground for its denial, accordingly we reverse the board's judgment and remand the case for a new trial.

Reversed.

SMITH, Judge, dissenting from the denial of the motion to dismiss and concurring in the conclusion reached on the merits:

I am sorry but I must dissent from that part of Judge Bland's decision which denies the Government's motion to dismiss the importer's appeal.

Sections 195 and 198 of the Judicial Code give to this court the right to review only such *final* decisions of the law and the facts respecting *the classification* of imported merchandise and *the rate of duty* imposed thereon and the fees and charges connected therewith and all appealable questions as to the *jurisdiction* of said board and all appealable questions as to the laws and regulations governing the enforcement and collection of customs revenues.

In this case no question is raised as to the classification of the merchandise or as to the rate of duty imposed thereon or to the fees or charges exacted by the collector or as to the jurisdiction of the board to hear and determine the importer's petition. Neither is there any *final* decision or judgment as to the laws and regulations governing the collection of the customs revenues. Indeed, no such decision was possible until after liquidation of the entry and as yet no such liquidation has been made.

The finding provided for in section 489 is purely preliminary and interlocutory and is not a final decision or judgment inasmuch as it does not finally determine or purport to finally determine the rights of the parties.

In the case of *Brown & Co.* v. *United States* (12 Ct. Cust. Appls.——; T. D. 40026) the Board of General Appraisers held that it was without jurisdiction to entertain the petition provided for in paragraph 489 and ordered its dismissal. From that order an appeal was taken to this court and that appeal we refused to dismiss on the ground that the decision of the board raised an appealable question as to the *jurisdiction* of said board and an

appealable question as to the laws and regulations governing the collection of customs revenues. In this case no appealable question as to the jurisdiction of the board or as to the laws and regulations has been raised or can be raised until the board is called upon to finally decide the rights of the parties.

In my opinion Congress vested the Board of General Appraisers with exclusive and final authority to hear the petition and make the findings provided for by section 489. As I see it, its finding is just as binding and conclusive on us as was that of the Secretary of the Treasury as to remission of additional duties under the law as it existed prior to the passage of section 489. But if the Board of General Appraisers be not the final arbiter in the matter, its finding is not a final decision or judgment and any error committed by the board must be reached by way of protest against the final liquidation. To hold otherwise simply means the postponement of liquidation for a period of eight months or a year and useless delays in the transaction of customs business. I cannot think that Congress intended any such result as that, and that if it had it would have expressly given the right of appeal, just as it did in appraisement cases.

I concur in the conclusion reached on the merits of the case.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1924.

THE UNITED STATES, Petitioner, v. O. B. FISH, Respondent.	No. 653.

On Petition for Writ of Certiorari to the United States Court of Customs Appeals.

BRIEF FOR RESPONDENT.

Statement of Case.

The decision below is reported in T. D. 40315, Treasury Decisions, Vol. 46, No. 3, July 17, 1924, page 34.

Petitioner's statement of the case and the facts is not controverted, but the following circumstances not referred to by petitioner, have a material bearing upon the issues in the case.

1. Section 489 of the Tariff Act of 1922, c. 356, 42 Stat., 858, imposes upon the Board of General Appraisers the duty of finding as a fact, upon the evidence submitted to it, the existence or non-existence of fraud in connection with the making of the entry. That is the only function of the Board. In this case the Board did not make the

statutory finding (R., 11, 12), but the Court of Customs Appeals found (R., 21) that the importer was denied a remission of the additional duties chiefly, if not entirely, upon the ground that he was very careless in the transaction relating to the making of the entry. The Court of Customs Appeals, therefore, did not assume to reverse a finding of the Board of General Appraisers on the statutory fact of fraud but reversed the Board because the Board had determined the case on other than statutory grounds. This was why the Court of Customs Appeals *remanded the case for a new trial* (R., 22).

The question for determination, therefore, is not whether the Court of Customs Appeals *in any case* has jurisdiction to entertain appeals from decisions granting or denying petitions for the remission of additional duties filed under Section 489 of the Tariff Act of 1922. Succinctly stated, the issue is: Has the Court of Customs Appeals jurisdiction to reverse the decision of the Board of General Appraisers and remand the case for a new trial, when the Court has found that the Board of General Appraisers did not conform to its statutory jurisdiction, did not make its statutory finding, but decided the case on extra-statutory grounds?

2. The entries in this case were not liquidated at the time when the petitions for remission of additional duties were filed. This is alleged in the petitions (R., 3, 5), and is nowhere controverted. The entries themselves show that they have not been liquidated even yet. The entries have not been stamped "liquidated" in accordance with Article 741, paragraph (g), Customs Regulations 1923.

In view of the fact that the entries have not been liquidated and no additional duties have been imposed, the question arises whether these petitions, although filed in

accordance with the then rule of the Board of General Appraisers, are not premature and null and void under the statute. Upon the liquidation of the entries the importer can file new petitions under the amended rule of the Board of General Appraisers.

The petitions for remission under consideration were filed within sixty days from the date of final appraisement in each case in accordance with the rule of the Board of General Appraisers then in effect, which rule made the time within which such petitions might be filed, run from the date of final appraisement irrespective of the liquidation of the entries. T. D. 39370, 42 Treas. Dec. 302. Afterwards, the Board of General Appraisers extended the time for filing petitions for remission of additional duties to sixty days after liquidation.

T. D. 40464, Treas. Dec. Vol. 46, No. 21, Nov. 20, 1924, page 1.

Section 489 of the Tariff Act of 1922 reads as follows. The portions deemed pertinent have been italicized:

> "ADDITIONAL DUTIES.—*If the final appraised value of any article of imported merchandise which is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the entered value, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total final appraised value thereof for each 1 per centum that such final appraised value exceeds the value declared in the entry. Such additional duty* shall apply only to the particular article or articles in each invoice that are so advanced in value upon final appraisement and *shall not be imposed upon any article upon which the amount of duty im-*

posed by law on account of the final appraised value does not exceed the amount of duty that would be imposed if the final appraised value did not exceed the entered value, and shall be limited to 75 per centum of the final appraised value of such article or articles. *Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereof in any way avoided, except in the case of a manifest clerical error,* upon the order of the Secretary of the Treasury, *or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise.* If the appraised value of any merchandise exceeds the value declared in the entry by more than 100 per centum, such entry shall be presumptively fraudulent, and the collector shall seize the whole case or package containing such merchandise and proceed as in case of forfeiture for violation of the customs laws; and in any legal proceeding other than a criminal prosecution that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he rebuts such presumption of fraud by sufficient evidence.

"*Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly.* Such additional duties shall not be refunded in case of exportation of the merchandise, nor shall they be subject to the bene-

fit of drawback. All additional duties, penalties, or forfeitures applicable to merchandise entered in connection with a certified invoice shall be alike applicable to merchandise entered in connection with a seller's or shipper's invoice or statement in the form of an invoice. Duties shall not, however, be assessed upon an amount less than the entered value, except in a case where the importer certifies at the time of entry that the entered value is higher than the value as defined in this Act, and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisement or re-reappraisement, and the importer's contention in said pending cases shall subsequently be sustained, wholly or in part, by a final decision on reappraisement or re-reappraisement, and it shall appear that the action of the importer on entry was so taken in good faith, after due diligence and inquiry on his part, and the collector shall liquidate the entry in accordance with the final appraisement."

SUMMARY OF POINTS.

I.

The jurisdiction of the Court of Customs Appeals to render the decision now under review is found in sections 195 and 198 of the Judicial Code.

II.

There is nothing in the Tariff Act of 1922 which indicates an intent upon the part of Congress to depart from the previous rulings as to the scope of the jurisdiction granted to the Court of Customs Appeals by sections 195 and 198 of the Judicial Code.

III.

The language of section 489 of the Tariff Act of 1922 indicates that the decisions of the Board of General Appraisers in remission cases are reviewable.

IV.

If the petitions for remission of additional duties (which, under the Board's rule, were filed before the liquidation of the entries) are premature, then all the proceedings thus far have been a nullity, and the importer will have the opportunity, upon the liquidation of the entries, of filing petitions which are valid and timely under the amended rule of the Board.

ARGUMENT.

I.

The jurisdiction of the Court of Customs Appeals to render the decision now under review is found in sections 195 and 198 of the Judicial Code.

Respondent does not claim that the Court of Customs Appeals has any further or greater jurisdiction than that which Congress has apportioned to it. The jurisdiction of the Court of Customs Appeals to render the decision now under review is found in sections 195 and 198 of the Judicial Code, March 3, 1911, c. 231, 36 Stat. 1087, as amended by the Act of Cong., Aug. 22, 1914, c. 267, 38 Stat. 703. These sections so far as material read as follows:

Section 195.

"The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. * * *"

Section 198.

"If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. * * *"

It will be noted that section 195 gives the Court of Customs Appeals jurisdiction to review final decisions of the Board of General Appraisers in three classes of cases: (1) cases involving the classification of merchandise and the rate of duty imposed thereon under such classification, (2) questions as to the jurisdiction of the Board of Gen-

eral Appraisers, (3) all appealable questions as the laws and regulations governing the collection of the customs revenues.

This case is not in the first class. It does not relate to the classification of merchandise and the rate of duty imposed thereon under such classification, for the entries have never been liquidated and the Collector has not classified the merchandise for duty.

This case is within the third class of appealable questions specified in section 195 of the Judicial Code. The case presents an appealable question as to the laws and regulations governing the collection of the customs revenues within the meaning of Section 195. Before the Tariff Act of 1922 was passed it was held that any final decision of the Board of General Appraisers was appealable except when an appeal had been denied by the statute.

Under the Tariff Act of Aug. 5, 1909, c. 6, 36 Stat. 11, by which statute the decision of the Board of General Appraisers was made final in reappraisement cases, the Court of Customs Appeals said:

> "We think, however, that no purpose on the part of Congress to vest a jurisdiction in the board over cases not reviewable by this Court (except in appraisements) can be found if the terms of the act as a whole be considered."
>
> *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. Appls. 373, 374.

This is precisely the view of this Court as to the Circuit Court's jurisdiction (prior to the organization of the Court of Customs Appeals) to entertain appeals from decisions

of the Board of General Appraisers under the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131. The Court said:

> "In other words, the right of review by the Circuit Court is co-extensive with the right of appeal to the board as to all matters except the *dutiable value* of the imported merchandise, as to which the decision of the board of general appraisers is by section 13 made conclusive."

United States v. *Klingenberg*, 153 U. S., 93, 102.

It must be presumed that Congress enacted the Tariff Act of 1922 in the light of the previous decisions as to the scope of the jurisdiction of the appellate tribunal, and intended that all decisions of the Board of General Appraisers therein provided for should be subject to review by the Court of Customs Appeals unless a statutory indication to the contrary was given. Such an indication is given, for instance, in section 501 of the Tariff Act of 1922, where Congress has provided that appeals to the Court of Customs Appeals in reappraisement cases should be limited to questions of law, whereas section 195 provides for appeals generally on questions of both fact and law.

In section 489, on the contrary, there is not the slightest suggestion that the decisions of the Board of General Appraisers on petitions for remission of additional duties are to be final and so excepted from the appellate jurisdiction of the Court of Customs Appeals, nor is there any indication in section 489 that the jurisdiction granted in section 195 of the Judicial Code is to be in any way restricted.

This case is within the second class of appealable ques-

tions specified in section 195 of the Judicial Code. The case involves an appealable question as to the jurisdiction of the Board of General Appraisers within the meaning of section 195.

Under section 489 of the Tariff Act of 1922 the only function of the Board of General Appraisers is to pass upon the question of the presence or absence of fraud in the making of the entry. This is not a case where the question is whether the Board of General Appraisers found the statutory fact in accordance with the testimony. Such a case might present a very different issue. In the present case the issue presented to the Court of Customs Appeals was jurisdictional in its character and it is on that issue that the Court of Customs Appeals determined the case. The Court of Customs Appeals reversed the judgment of the Board, not because the Board's finding of fact as to fraud was contrary to the weight of the evidence, but because the Board never determined the statutory fact at all but went outside the scope of its jurisdiction and determined the case on the question of carelessness. The Court of Customs Appeals said (R. 21, 22):

> "In the present case however, as above observed, we find that the Board of General Appraisers denied the petition of the importer apparently chiefly on the grounds that the wrong man testified, and that the broker should have testified, and that the importer was careless and negligent. The opinion below closes with the following statement: 'The most that can be said about the importer was that he was very careless. Sometimes neglect is as bad in law as acts of commission.'
>
> "We need not here discuss the question raised by the fact that the importer failed to call as a witness the broker who made the entry, for we are sat-

isfied that the judgment of the board must be reversed upon the ground that apparently the importer was denied a remission of the additional duties chiefly if not entirely upon the ground that he was very careless in the transaction relating to the making of the entry. As we have stated above the burden rested upon the importer to establish by satisfactory evidence that his action was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. If the importer in any such case establishes these facts as aforesaid he becomes entitled thereby to the findings of the board in his favor as prescribed by the statute, and he would not forfeit that right because of mere carelessness alone upon his part in the transaction.

"In the present case, if we construe the board's opinion correctly, the importer's petition was denied upon the ground that if the importer was not guilty of fraud he was at least very careless. We do not regard this finding as an answer to the issue raised by the importer's petition, or as a sufficient ground for its denial, accordingly we reverse the board's judgment and remand the case for a new trial."

It is apparent from the above that the decision of the Court of Customs Appeals is based upon the fact that the Board of General Appraisers made no finding as to the fact required by the statute, but determined the case upon an extra-statutory ground, to wit, carelessness. The Court of Customs Appeals *remanded the case for a new trial.* It is obvious that it did so on jurisdictional grounds in order to permit the board to fulfill its statutory function which it had neglected. That the decision of the Court of Customs Appeals was jurisdictional in its nature

is shown in part by the fact that the Court found it unnecessary to discuss the question raised by the importer's failure to call as a witness the custom-house broker who did the actual physical clerical work in making the entry.

Whether or not the Court of Customs Appeals interpreted this decision of the Board of General Appraisers correctly is not in issue on this proceeding. The sole question is whether the Court of Customs Appeals has jurisdiction to reverse a decision of the Board of General Appraisers and remand the case for a new trial in a case where the Board of General Appraisers has failed to exercise its jurisdiction by making a finding as to fraud, but has decided the case on the question of carelessness irrespective of whether or not there was fraud.

The question of the appellate jurisdiction of the Court of Customs Appeals in these remission cases has been heretofore determined in favor of that jurisdiction.

The decision of the Court of Customs Appeals now under review follows the decision of the same Court in the case of *Wm. A. Brown & Co., et al.* v. *United States*, T. D. 40026, 45 Treas. Dec. 199. The Court there affirmed its jurisdiction, but decided the case on the merits in accordance with the Government's contention. The importers applied to this Court for a writ of certiorari, which application was denied by this Court on April 28, 1924. The United States, respondent in that case, called the attention of this Court to the fact that the issue as to the jurisdiction of the Court of Customs Appeals was an issue in the case. The following language appears on page 5 of the brief for the United States in that case:

> "Has the United States Court of Customs Appeals jurisdiction to review a finding of the Board of United States General Appraisers made on a

petition for the remission of additional duties under said section 489?

"This issue was raised before the Court of Customs Appeals by a motion duly filed on behalf of the United States to dismiss the importer's appeal from a decision of the Board of General Appraisers which had dismissed the importer's petition on the ground that it was without jurisdiction in the matter. This motion was denied by the Court of Customs Appeals.

"The respondent submits that in the event of a writ of certiorari being granted herein, the question as to the jurisdiction of the Court of Customs Appeals over appeals involving the remission of additional duties under said section 489 is properly before this Court for consideration, notwithstanding the fact that the final decision in the instant case was in favor of the United States.

"If it shall be determined by this Court that a writ of certiorari be granted herein, the respondent requests that a review shall be had of the jurisdiction of the Court of Customs Appeals to entertain any appeal from decisions of the Board of General Appraisers on petitions for remission filed under said section 489."

In the case of *Peabody & Co.* v. *United States,* T. D. 40491, Treas. Dec. Vol. 46, No. 21, Nov. 20, 1924, page 69, the Court of Customs Appeals reviewed a decision of the Board of General Appraisers on a petition for remission and reversed the decision. The Government seems not to have objected to the jurisdiction of the Court of Customs Appeals in that case.

In *United States* v. *American Metals Co., Ltd.,* T. D. 40612, Treas. Dec. Vol. 47, No. 3, Jan. 15, 1925, page 56, the Court of Customs Appeals determined an appeal *by the United States* from a decision of the Board of General

Appraisers on a petition for remission. The importer, appellee in that case, moved to dismiss the appeal on the ground of jurisdiction, but the Court of Customs Appeals denied the motion to dismiss. In that case it will be noted that the Board of General Appraisers did make its statutory finding as to fraud, and at least one of the issues determined by the Court of Customs Appeals was whether the finding of the Board of General Appraisers was supported by the evidence.

The following appeals by the United States from decisions of the Board of General Appraisers on petitions for remission are now pending:

	Customs Court No.
United States v. *R. H. Macy & Co.,*	Suit 2247
United States v. *N. Y. Willow Furniture Co.,*	Suit 2435
United States v. *John V. Farwell Co.,*	Suit 2450
United States v. *Herbert Alfred Barnard,*	Suit 2461

II.

There is nothing in the Tariff Act of 1922 which indicates an intent upon the part of Congress to depart from the previous rulings as to the scope of the jurisdiction granted to the Court of Customs Appeals by sections 195 and 198 of the Judicial Code.

The provisions in the Tariff Act of 1922 relating to appeals, which are cited for the United States, petitioner, do not carry the implication that there is to be no appeal

in these remission cases arising under section 489 of the Tariff Act of 1922.

It is extremely significant that the only sections of the Tariff Act of 1922 (sections 316 and 517) which affirmatively grant a right of appeal to the Court of Customs Appeals are sections where the Judicial Code was not broad enough in its terms to constitute a basis for the appellate court's jurisdiction. Section 316 grants an appeal to the Court of Customs Appeals from decisions of the United States Tariff Commission. This was necessary because the Judicial Code gave the Court of Customs Appeals jurisdiction over only appeals from decisions of the Board of General Appraisers. Section 517 grants a right of appeal to the Court of Customs Appeals where the Board of General Appraisers has imposed a penalty for filing a frivolous protest. This was necessary because, although the decision is a decision of the Board of General Appraisers, the subject-matter does not involve a question as to the laws and regulations governing the collection of the customs revenue and so is not within the terms of the Judicial Code.

The other sections referred to by the United States do not confer appellate jurisdiction but merely recognize the existing jurisdiction by providing for the finality of decisions of the Board of General Appraisers if an appeal is not taken as provided by the Judicial Code.

Section 501 deals with appeals in reappraisement cases. It does not confer appellate jurisdiction upon the Court of Customs Appeals in such cases. It limits the jurisdiction granted by the Judicial Code to questions of law. The Judicial Code grants jurisdiction in all questions of law and fact. Similarly sections 515, 516 (c) and 563 do not confer any jurisdiction upon the Court of Cus-

toms Appeals. They merely provide that in each instance the decision of the Board of General Appraisers shall be final unless an appeal is taken as provided by the Judicial Code. It is the Judicial Code which confers the jurisdiction. Section 515 relates to the finality of the decisions of the Board of General Appraisers in protest cases. It must be read in connection with section 514 which provides for protests against decisions of the Collector. These provisions are carried over from the language of the Customs Administrative Act, June 10, 1890, c. 407, 26 Stat. 131. This act established the Board of General Appraisers. The language as to the finality of decisions found in sections 514 and 515 of the Tariff Act of 1922 finds its origin in the Customs Administrative Act of 1890. The original purpose was to do away with the common-law method of attacking decisions of the Collector and to make the special statutory procedure exclusive.

The fact that section 489 gives the Board of General Appraisers authority to determine the question of fraud in the entry on "satisfactory evidence," *does not indicate that the Board of General Appraisers is to have discretionary, arbitrary and unreviewable power in the premises.*

This question is determined in the present case by the Court of Customs Appeals in the decision below (R., 19, 20). Even if the Court's decision were not sound, its interpretation of the statute could not be questioned on this proceeding as the Court remanded the case for a new trial, and the only question here involved is the jurisdiction of the Court to render its decision, not the correctness of the decision. The Court of Customs Appeals said (R., 19, 20):

"A casual reading of section 489 might lead to the hasty conclusion that the words 'upon petition filed and supported by satisfactory evidence under such rules as the board may prescribe' left action upon the petition to the arbitrary discretion of the board, and that 'satisfactory evidence' might mean *satisfactory to the board.* This was not the intention of Congress, and the courts have not so construed similar provisions.

"In United States *v.* Lee Huen (118 Fed. 442) the court was construing the following provision from the statutes:

" 'That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended, shall be adjudged to be unlawfully within the United States unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge or commissioner, his lawful right to remain in the United States.'

and the court there said:

" 'In this connection it should be remembered that credible and undisputed evidence amounts to proof, and must be accepted as such. What shall be accepted as satisfactory proof is evidence that satisfies the judicial mind. The defendant is not required to satisfy the prejudiced, the capricious, the unreasonable, or the arbitrary mind; but he must satisfy the judgment of a reasonable man, acting honestly and with good judgment, and without prejudice or bias. The commissioner may not arbitrarily or capriciously, or against reasonable, unimpeached and credible evidence, containing no element of inherent improbability, and which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied. When clearly, from the evidence, the judicial mind ought to be satisfied, in the eye of the law it is satisfied.'

"The court quoted Stephens' Digest and Greenleaf on Evidence, as defining 'satisfactory evidence,' as follows:

"'Satisfactory or sufficient evidence: That amount or weight of evidence which is adapted to convince a reasonable mind.' (Steph. Dig. Ev. 2d Ed., p. 3, note 2.)

"'By "satisfactory evidence," which is sometimes called "sufficient evidence," is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interest.' (I Greenleaf, Evidence, Sec. 2.)" (R., 19, 20.)

The power given to the Board of General Appraisers in connection with petitions for remission is not a pardoning power but a judicial power. The Board merely finds the facts as to fraud. The remission of the additional duties is not in the hands of the Board at all, but is in the hands of the Collector.

In the Report of the United States Tariff Commission upon the Revision of the Customs Administrative Laws, 1918, pages 18, 19, is to be found the recommendation of the Tariff Commission which led to the amelioration of the harshness of the law which at that time imposed additional duties in the case of under-valuations even when the under-valuations were innocent. The Tariff Commission recommended that the finding as to fraud should be made by the Secretary of the Treasury. Congress,

however, recognizing that this finding was judicial in its character, did not adopt the recommendation of the Tariff Commission, but invested the Board of General Appraisers with jurisdiction to make its judicial finding. It will be noted in section 489 that the Board of General Appraisers has nothing whatever to do with the remission of the additional duties. It simply makes its statutory finding. The remission of the additional duties is provided for in the second paragraph of section 489 and is evidently to be made by the Collector by liquidation. The Board of General Appraisers no more remits the additional duties than it reliquidates the entry.

III.

The language of section 489 of the Tariff Act of 1922 indicates that the decisions of the Board of General Appraisers in remission cases are reviewable.

As shown above, both this Court and the Court of Customs Appeals prior to the passage of the Tariff Act of 1922 held it to be the purpose of Congress that there should be an appeal from all decisions of the Board of General Appraisers unless a specific exception is made. The reason for this purpose on the part of Congress is easily ascertainable from the constitution of the Board of General Appraisers itself. It is made up of three separate sub-boards (section 518, Tariff Act of 1922) and, unless there is an appeal, there is no way of unifying and harmonizing the decisions of these three sub-boards.

The fact that section 489 does not make the decisions of the Board of General Appraisers final in remission cases

shows that Congress intended that those decisions should be reviewable.

Section 514 of the Tariff Act of 1922 is a re-enactment of the provision for protests against decisions of the Collector. For the first time it extends the right of protest to include the legality of all orders and findings entering into the Collector's decision. The entries in the case here under consideration have not been liquidated. Therefore, if there is no direct appeal to the Court of Customs Appeals from the decision on the petition, the question of the legality of the decision can unquestionably be raised by protest at the time of the liquidation of the entries.

Before the passage of the Tariff Act of 1922, when direct appeal in reappraisement cases was expressly prohibited by the statute, the question of the legality of the reappraisement decisions of the Board of General Appraisers was raised by protest, and it was undoubtedly because of the cumbrousness of this method that Congress, in section 501 of the Tariff Act of 1922, so far removed the restrictions as to permit the appellate jurisdiction of the Court of Customs Appeals to be exercised in reappraisement cases on questions of law. In view of the fact that section 489 does not make the decisions of the Board of General Appraisers in remission cases final and conclusive, we must conclude that Congress left the way to review open. Why should we assume that Congress intended that the review should be by the more cumbrous method of protest, instead of by direct appeal, when Congress has indicated the directly contrary intent in reappraisement cases? It is difficult indeed to understand why the United States should wish to shut the door upon the method of direct appeal, the advantages of which it has already so frequently made use of in these remission

cases, when the result will be merely to substitute a more cumbrous and inconvenient method of appeal by way of protest.

It is ascertainable from the decisions of this Court, that the Board of General Appraisers is not above the law even in cases where the law does not specifically grant a right of appeal.

In *Waite, et al., as General Appraisers, etc.* v. *Macy, et al.*, 246 U. S. 606, this Court held (p. 610) that the Board of General Appraisers must keep within the statute. That case arose under the Tea Act, March 2, 1897, c. 358, 29 Stat. 604, and as the case had nothing whatever to do with the Customs laws and did not involve a money claim, there was no remedy by appeal and it was necessary to resort to the remedy by injunction.

A similar case is *Campbell* v. *U. S.*, 107 U. S. 407. In that case the Secretary of the Treasury had refused the payment of drawback to which Campbell was entitled under section IV, Act of Cong., Aug. 5, 1861, c. 45. No right of appeal was given by the statute. Campbell sued in the Court of Claims for an allowance of the drawback. This Court held (p. 410) that the Court of Claims had jurisdiction of such a claim because it was founded on a law of Congress.

In the present case the importer contends that the Court of Customs Appeals has jurisdiction because the case is based on the laws and regulations governing the collection of the Customs revenues and because it involves a question as to the jurisdiction of the Board of General Appraisers.

IV.

If the petitions for remission of additional duties (which, under the Board's rule, were filed before the liquidation of the entries) are premature, then all the proceedings thus far have been a nullity, and the importer will have the opportunity, upon the liquidation of the entries, of filing petitions which are valid and timely under the amended rule of the Board.

As pointed out above, the petitions for remission in this case were filed within sixty days from the date of final appraisement without waiting for the liquidation of the entries. It has many times been held that there is no limit of the time for the original liquidation of an entry. *United States* v. *De Rivera*, 73 Fed. 679. Therefore, the result of the original rule of the Board of General Appraisers (T. D. 39370) was to require the filing of petitions for remission before liquidation. By its later rule in T. D. 40464, the Board of General Appraisers extended the time for filing the petition to sixty days after the liquidation. It is believed that the amended rule conforms more correctly to the requirements of the statute and the intent of Congress.

Under the statute there can be no petition for remission of additional duties before liquidation, for until liquidation it is not determined that there will be any additional duties.

The wording of section 489 shows that petitions should be filed after liquidation. It will be noted that the first part of section 489 provides that in all cases where the statutory elements exist, the additional duties "shall be

levied, collected and paid." There is no exception to this rule. The matter of petition comes later. Of course the levying of the additional duties is the liquidation and, therefore, in view of the language of the statute, the petition must be filed after liquidation. It is manifest that, in spite of its rule, the Board of General Appraisers has no jurisdiction of a petition under section 489 until after the additional duties have been "levied, collected and paid." The subject-matter requisite for jurisdiction is lacking. There are no additional duties to be remitted and there never will be any unless the Collector determines them on liquidation.

If we look at the first part of section 489 we find that, even though the appraised value may be different from the entered value, there are no additional duties if (1) the merchandise is subject to specific duty, (2) the entered value is not exceeded by the final appraised value, (3) the total amount of duty is not increased by the final appraisement. The point of the whole matter is that the reappraisement decision does not determine these questions, but the determination of each is a matter solely for the Collector, and his determination is made on the liquidation of the entry.

The appraisement does not determine the dutiable classification of the merchandise. The Collector is the classifying officer and his decision is the liquidation of the entry. Article 174, Customs Regulations, 1923, paragraphs (a), (c). Article 1235, Customs Regulations, 1923, states that the Appraiser shall "describe the merchandise in order that the Collector may determine the dutiable classification thereof."

The appraisement does not determine that the appraised value exceeds the entered value. This must be

determined by the Collector on liquidation. Of course this is a very easy matter in a case like the one now under consideration where the appraisement and the entry are made in the same currency. If the appraisement and the entry are made in different currencies the determination is more difficult and must be made by the Collector on liquidation. The conversion of the currency is the duty of the Collector and is not an appraising function. *Masson* v. *United States*, 1 Ct. Cust. Appls., 149. The Treasury Department announced the rule for customs officers in T. D. 37365, 33 Treas. Dec. 220, 221, paragraph (6).

Whether the total amount of duty is increased by the final appraisement can of course be determined only by the Collector on liquidation.

If a petition for remission of additional duties is filed after liquidation under the amended rule of the Board of General Appraisers, then there is an appeal to the Court of Customs Appeals from the decision of the Board on such petition because, in addition to the reasons given above, the case is a case "as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification" within the meaning of section 195 of the Judicial Code.

The judgment of the Court of Customs Appeals should be affirmed, or the petitions for remission should be held to be premature.

Respectfully submitted,

ALLAN R. BROWN,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 653.—October Term, 1924.

The United States of America, Petitioner, *vs.* O. B. Fish. } On a Writ of Certiorari to the United States Court of Customs Appeals.

[June 8, 1925.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This case is brought here by certiorari after a certificate of importance by the Attorney General, in accord with Section 195 of the Judicial Code, as amended by the Act of Congress, approved August 22, 1914, c. 267, 38 Stat. 703. The case in the Court of Customs Appeals was an appeal from a decision of the Board of General appraisers denying two petitions filed under Section 489 of the Tariff Act of September 21, 1922, c. 356, 42 Stat. 858, 962. The parts of Section 489 which are relevant here are inserted in the margin.*

The importer purchased at Hong Kong plaited peacock flues:

50 pounds at $26.00 per pound, July 9, 1922.
48 pounds at $28.00 per pound, July 27, 1922.
50 pounds at $28.00 per pound, Aug. 20, 1922.
36 pounds at $28.00 per pound, Aug. 30, 1922.
27 pounds at $32.00 per pound, Aug. 30, 1922.

The importations were entered at the custom house by the importer's broker and the entered value stated in the entries was the

*Sec. 489. Additional Duties. If the final appraised value of any article of imported merchandise which is subject to an ad valorem rate of duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the entered value, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total final appraised value thereof for each 1 per centum that such final appraised value exceeds the value declared in the entry. Such additional duty shall apply only to the particular article or articles in each invoice that are so advanced in value upon final appraisement and shall not

invoice price paid for each lot of flues. All the goods were appraised at $32.00 per pound. Under paragraph 1419 of the Tariff Act of 1922 (42 Stat. 915) the duty on the peacock flues was 60 per cent. ad valorem. The appraised value of $32.00 a pound exceeded the entered value by 22 per cent. It exceeded the entered value of $26 a pound by 14 per cent. This increased the duty on the first 50 pounds from $960 to $1,328 and on the remaining undervalued 134 pounds $2,572 to $3,183, or a total on all entries of additional duties $979. This illustrates the importance of the conclusion of the Board as to the intent of the importer in undervaluation under Section 489. In due time after the appraisement the importer filed petitions to avoid the imposition of the additional duties. At the hearing before the Board the only witness was the importer, who testified that when he bought he got quotations by cable, that the market changed rapidly, sometimes as much as 50 per cent., that he had been importing for two years and that this was the first instance in which there had been an advance in value by the appraiser; that he gave the broker the invoice and told him to make the entry, and that in so doing he did not intend to deceive the appraiser. This was all the evidence. The Board of General Appraisers denied the petition, on the ground that the broker who made the entry should have testified and suggested that the most favorable view as to the importer's conduct was that he was very careless. The importer appealed. The Government moved to dismiss the appeal, on the ground that there was no right to appeal. The Court denied the motion to dismiss, holding that it had jurisdiction. On

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be imposed on any article upon which the amount of duty imposed by law on account of the final appraised value does not exceed the amount of duty that would be imposed if the final appraised value did not exceed the entered value, and shall be limited to 75 per centum of the final appraised value of such article or articles. Such additional duties shall not be construed to be penal and shall not be remitted nor payment thereon in any way avoided, except in the case of a manifest clerical error, upon the order of the Secretary of the Treasury, or in any case upon the finding of the Board of General Appraisers, upon a petition filed and supported by satisfactory evidence under such rules as the board may prescribe, that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. . . . Upon the making of such order or finding, the additional duties shall be remitted or refunded, wholly or in part, and the entry shall be liquidated or reliquidated accordingly. . . .

the merits the Court found that the Board of General Appraisers erred in not finding whether there was or was not fraud or intent to deceive by the importer or his broker, and remanded the case for a new trial on that issue.

The relevant parts of Section 195, as amended, 38 Stat. 703, and of Section 198 of the Judicial Code, adopted March 3, 1911, are as follows:

"Sec. 195. The Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues. . . .

"Sec. 198. If the importer, owner, consignee, or agent of any imported merchandise, or the collector or Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, or with any other appealable decision of said board, they, or either of them, may, within sixty days next after the entry of such decree or judgment, and not afterwards, apply to the Court of Customs Appeals for a review of the questions of law and fact involved in such decision. . . ."

The Government insists that the action of the Board of General Appraisers under Section 489 of the Tariff Act of 1922, does not involve such an exercise of judicial judgment as to be regarded as appealable under the general jurisdiction of the Court of Customs Appeals. The suggestion is that as the evidence to be submitted on the point at issue is to be under rules to be approved by the Board, it is a matter confined to their action; that their discretionary power is to be exercised very much as the discretion is to be exercised by the Secretary of the Treasury on clerical errors under Section 489, or as exercised by him on a question of intent of the importer in the Act of October 3, 1913, c. 16, sec. III, I, 38 Stat. 114, 184.

The Court of Customs Appeals reached the conclusion that the decision of the Board on the law and facts might affect the duty

imposed on the imported articles so materially that Congress must have intended to give the importer the right to avail himself of the provision for appeal to the Court of Customs Appeals. We agree with that conclusion. We think that this is a decision of the law and the facts respecting the rate of duty imposed on classified merchandise imported, or at least that it concerns the fees and charges connected therewith. We think that it is a question relating to the laws and regulations governing the collection of customs revenues of importance and is appealable. It comes, therefore, under the several heads of the jurisdiction of the Court of Customs Appeals, as defined in Sections 195 and 198. We think that the interpretation of the expression "appealable questions" as only including questions which are elsewhere referred to as appealable, is too narrow a view of the purpose of the statute. It would be unreasonable to suppose that in a Court of Appeals given the power to re-examine both the law and the facts on all the important issues raised in respect to duties was excluded from reviewing the issue of retaining or remitting a considerable percentage of those duties. This view is sustained by *Brown & Co.* v. *United States,* 12 Ct. Cust. Appls.—although the point there involved was only one of jurisdiction of the Board.

But it is said that this decision of the Board of Appeals is not a final decision, and that only final decisions are subject to review by the Court of Customs Appeals. Section 195 refers to final decisions, Section 198 to decisions. But even if the language of Section 195 is to prevail, we think that under Section 489 the decision of the Board of General Appraisers as to increase or decrease of duties is final, so far as the Board is concerned. Such a decision under Section 489 can not take place until there is a final appraisement, because until that time there is no opportunity to determine whether the 1 per centum clause applies. But it is said that the decision is not really final until after the liquidation by the Collector, and that liquidation in this case has not taken place. We do not think that the liquidation by the collector of the duties in such cases constitutes the final decision subject to appeal. Section 489 itself shows that the final decision of the Board on this point may be before or after liquidation. This is not a case analogous to the final judgments in the ordinary practice of appellate courts in respect to which it is held that cases appealed

may not be taken up piecemeal. As the Board may make a final decision on the point, we do not see why the Court of Customs Appeals has not jurisdiction at once to consider the ruling of the Board and thus facilitate the ultimate liquidation of the duties if it has not already been completed.

Upon the merits of the case, we think the Court of Customs Appeals was right and that the finding of the Board of General Appraisers did not respond to the requirement of the statute. The issue to be found by the Board was whether the importer showed by his evidence that the entry of the merchandise at a less value than that returned upon final appraisement was without any intention to defraud the revenue of the United States or to conceal or misrepresent the facts of the case or to deceive the appraiser as to the value of the merchandise. The issue presented to the Board was, "Has the importer sustained the negative in this regard?" Merely to find that the importer was careless is not a finding sufficient to justify the Board in deciding whether there should be a remission. Both the importer and the Government are entitled to a finding either that there was no intent to defraud or that the importer did not sustain his burden that there was no such intent.

The judgment of the Court of Customs Appeals is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.